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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 255

THEODORE BERNSTEIN, STANLEY HAUSER, BERTRAM LESSUCK, DAVID LUBELL, JONATHAN LUBELL, BERNARD RADOFF, SAMUEL SUCKOW, RUDOLPH THOMAS,

Inductees in the Army of the United States,

Petitioners,

against

LIEUTENANT GENERAL THOMAS W. HERREN, Commanding General, First Army, Fort Jay, Governor's Island, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
The Statutes, Regulations and Constitutional Provisions Involved	2
Statement of Case	4
Questions Presented	7
Reasons for Granting the Writ	9
I	9
II	10
III	13
IV	16
V	17
VI	18
VII	20
VIII	20
Conclusion	22
Appendix A—Opinion of U. S. Court of Appeals, Second Circuit, in re Bernstein, et al. v. Lt. Gen. Herren, etc.	23
Appendix B—Opinion of U. S. Court of Appeals, Second Circuit, in re Schustack v. Lt. Gen. Herren, et al.	26

TABLE OF CASES CITED

	PAGE
Bailey v. Richardson, 182 F. 2d 46	14
Burns v. Wilson, 346 U. S. 137	16
Columbia Broadcasting System v. U. S., 316 U. S. 407	19
Connelly v. General Construction Co., 269 U. S. 385	13
Cummings v. Missouri, 4 Wall. 277	11
Davis v. Woodring, 111 F. 2d 523	16
Dynes v. Hoover, 20 How. 65	16
Engineers Public Service Co. v. SEC, 138 F. 2d 936, dismissed as moot, 332 U. S. 788	19
Galvan v. Press, 347 U. S. 522	11
Garland, Ex parte, 4 Wall. 333	11
Gentila v. Pace, 193 F. 2d 1924	16
Great Northern Ry. Co. v. Merchants Elev. Co., 259 U. S. 285	19
Harmon v. Brucker, 137 Fed. Supp. 850	9
Helen, St. v. Wyman, 139 Fed. Supp. 545	9
Hirshberg v. Cooke, 336 U. S. 210	16
Hotch v. U. S., 212 F. 2d 280	21
Jay v. Boyd, U. S. , Oct. Term, 1955	13
Marshall v. Wyman, 132 Fed. Supp. 169	9
Milligan, Ex parte, 4 Wall. 2	10, 16
Mitchell v. Harmony, 13 How. 115	16
Morgan v. U. S., 304 U. S. 1	13
Panitz v. District of Columbia, 112 F. 2d 39	19

PAGE

Parker v. Lester, 227 F. 2d 708 ..... 14, 19

Patterson v. Lamb, 329 U. S. 539 16

Peters v. Hobby, 349 U. S. 331 ..... 10, 13

Schustack v. Herren, 136 Fed. Supp. 850 ..... 9, 10, 15, 17

Shapiro v. U. S., 69 Fed. Supp. 205 16

Shaughnessy v. Pedreiro, 349 U. S. 48 ..... 3, 16, 17

Skinner & Eddy Corp. v. U. S., 249 U. S. 557 19

Slochower v. U. S., U. S. 12

U. S. v. Hiatt, 141 F. 2d 664 16

U. S. v. Keating, 121 Fed. Supp. 477 9

U. S. ex parte Toth v. Quarles, 350 U. S. 11 10

U. S. v. Lattimore, 215 F. 2d 847 13

U. S. v. Ullmann, U. S. , Oct. Term, 1955 10

Ullmann v. U. S., U. S. 12

Wieman v. Updegraff, 344 U. S. 183 10

Williams v. Fanning, 332 U. S. 490 ..... 3, 16, 17

Winters v. People of State of New York, 333 U. S. 507 13

STATUTES CITED

Administrative Procedure Act (5 U. S. C. 1001 ff) 8, 15

Section 1001 21

Section 1002 20

Public Law 733, August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, et seq.) 2

Uniform Code of Military Justice (50 U. S. C. 544, 602), Article 31 6

PAGE

Universal Military Training and Service Act of 1948 (50 U. S. C. App. Secs. 451, et seq.) 2, 17, 20

United States Constitution:

First Amendment 2, 12

Fifth Amendment 2, 6, 7, 12

28 U. S. C. Sec. 1254 2

MISCELLANEOUS CITED

Authorities:

Davis, The Administrative Law, 614 ff 18

Exhaustion of Administrative Remedies, 39 Cornell Law Quarterly 273 18

The Draftee and Internal Security 15

Orders, Regulations, etc.:

Army Regulation AR 604-10:

Sec. 2a 5

Sec. 2.1(b) 3

Sec. 3 5

Sec. 13b 5

Sec. 13b(1) 6

Sec. 13b(2) 13

Sec. 13b(4) 6, 13

Sec. 13b(6) 6

Sec. 13b(7) 13

Sec. 13b(8), (9) and (10) 13

Sec. 13b(12) 13

PAGE

Sec. 15b(10), (11) and (12) 11

Sec. 17b(1)(a) and (b) 6, 12, 14

Sec. 19(b) 5

Sec. 31c(1) 6

Sec. 32 6

Sec. 32c(4), (5) 6

Sec. 32e(8)(a) 7

Sec. 33 7

Department of Army Message 402295 dated March 1956 14

Department of Defense Directive No. 5210.9 20

Executive Order 10450 6

SR 605-200-1, Sec. 5a(2) 7

32 C. F. R. 500, et seq. 21

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners herein respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 1, 1956, affirming the judgment of the United States District Court for the Southern District of New York (Plaintiffs' App. 44a).

Opinions Below

The opinion of the District Court decided March 8, 1956 F. Supp. (SDNY) not yet reported (Plaintiffs' App. 44a).[1] The opinion of the Court of Appeals (App. B has not yet been reported).

Jurisdiction

The judgment of the Court of Appeals was entered June 1, 1956 (App. A). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254.

The Statutes, Regulations and Constitutional Provisions Involved

This case involves the Universal Military Training and Service Act of 1948, 50 U. S. C. App. Sec. 451,454,b, Public Law 733, Aug. 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1 et seq.); Army Regulation AR 604-10 too voluminous to include in this petition, however, copies are submitted herewith.

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States.

Statement of Case

A. This is an action for a declaratory judgment challenging the validity of Army Regulation AR 604-10 which appellants contend violates their constitutional and statutory rights (Plaintiffs' App. 2a ff.). At the same time that the complaint was filed, the plaintiffs moved for an injunc-

[1] Plaintiffs' App. refers to the Plaintiffs' Appendix in the Court of Appeals, Second Circuit: App. A & B refer to the Appendices to this Petition.

tion pendente lite; defendant cross-moved to dismiss the complaint (Plaintiffs' App. 8a). The District Court (Edelstein, J.) denied both motions 136 F. Supp. 493.[2] Thereafter the plaintiffs moved for summary judgment and the defendant cross-moved for the same relief. On March 8, 1956, District Judge Silvester J. Ryan rendered judgment for the defendant, dismissing the complaint "for lack of jurisdiction" (Plaintiffs' App. 47a et seq.). An appeal was thereafter taken to the Court of Appeals for the Second Circuit and the court dismissed for "the absence of the superior officers who alone have the authority to issue discharges".[3] Supra.

B. The plaintiffs are eight young men, who in 1954 were inducted into the United States Army through no voluntary acts of their own. They have each performed their assigned tasks in a superior fashion and in most instances have received meritorious citations in one way or another (Plaintiffs' App. 5a, 16a, 17a, 18a, 19a, 20a).

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[2] The motion for the injunction was denied in an unreported opinion.

[3] After this petition had been prepared notice of substantial amendments to AR 604-10 was received, which may modify some of the provisions complained of, though not the conclusions reached in this action or the conclusions reached in this Petition. One thing is clear, however—the ground upon which the Court of Appeals affirmed is no longer appropriate, for Sec. 21 now provides in par. b thereof:

> "b. Major commanders. Major commanders are responsible for the implementation of the Military Personnel Security Program at all installations within their geographical area, including class II and III installations. This includes responsibility for flagging action under AR. 600-31."

This, in conjunction with all other provisions which remain unchanged in AR 604-10 make it appear certain that the intention at all times was to make the "major commander" responsible and thus clearly the "proper party" under the doctrine of *Shaughnessy v. Pedreiro*, 349 U. S. 48 and *Williams v. Fanning*, 332 U. S. 490 (see post).

The defendant is the major commander of the area where they are now stationed and who instituted the proceedings, pursuant to AR 604-10 (Plaintiffs' App. 3a, 21a).

In July of 1955 the Army instituted proceedings, pursuant to AR 604-10, to determine their suitability for retention in the Army and permitting them, pursuant to the Regulations, to resign with an "Undesirable Discharge"; to answer the charges or to ask for a Field Board Hearing (Plaintiffs' App. 25a, 26a).[4] From the Regulation the best which plaintiffs could receive was a "Less than Honorable Discharge" certificate, with a notation thereon, and also upon other public records, that they were discharged for security reasons. Such action was threatened for alleged conduct which fell in one or all of the following categories:

> 1. Conduct, of a nature now proscribed by the Army, which was engaged in legally by the inductee prior to induction.
>
> 2. Continuing association with kin, friends, etc., who it is alleged may have engaged in proscribed activities.
>
> 3. Pleading of constitutional privilege before or after induction into the Army (Plaintiffs' App. 2a, 3a, 6a, 10a, 29a).

The Army seeks to justify its action by reference to certain Army Regulations, particularly a Regulation designated AR 604-10. Plaintiffs' contention has been that this Regulation or any Regulation purporting to permit this injustice is unconstitutional, both on its face and as applied to plaintiffs, and its issuance is beyond the statutory or any other power of the Secretary of the Army.

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[4] Counsel for the Petitioners have seen "Undesirable Discharge" files with notations thereon, in cases no different factually than those at Bar, indicating "Discharged with 'Undesirable Discharge' because of disloyal and subversive activities." The Veterans Administration has classified an "Undesirable Discharge" as a discharge under "Dishonorable Conditions" and has refused G. I. benefits for that reason.

In all cases but one (Plaintiffs' App. 52a-60a) the plaintiffs availed themselves of the constitutional privilege prior to induction. In the one case where the plaintiff answered the questionnaire forms after induction he had been questioned prior to induction (Plaintiffs' App. 59a-60a). In all cases the Army was acquainted with the "derogatory information" prior to induction (Plaintiffs' App. 52a-60a).

Prior to hearings on the allegations this action was commenced and through Court and Administrative stays the final decisions were reserved.[3]

As is noted above, plaintiffs bring this action for a declaratory judgment that Regulation AR 604-10 is invalid on its face and as applied to this case.

Regulation AR 604-10, under which the Army is proceeding, will be handed up to the Court with this petition. The relevant sections of that Regulation may briefly be summarized:

Section 2a defines national security as protection against espionage, sabotage and subversion and any and all acts designed to weaken or destroy the United States.

Section 3 sets forth the policy that, when the retention of a member of the Armed Forces is not clearly consistent with the interests of national security, he will be discharged, his discharge to be no higher than "General, under honorable conditions." Section 19b provides that when such a "General Discharge" is granted, all discharge papers will contain a statement that the discharge is pursuant to AR 604-10.

Section 13b of the Regulations purports to set forth a list of thirteen criteria to be applied by the Army and

[3] In March 1956 hearings were held. One plaintiff has been separated after 2 years of service with an "Indeterminate Discharge," and the results of the hearings have been stayed by the Court of Appeals pending return of its mandate.

expressly refers to "activities and associations * * * whether current or past." The criteria include matters ranging all the way from the commission of treason (subsec. (1)) to sympathetic association with a person who had a sympathetic association with a group "which is * * * subversive" (subsec. (10)). Subsection (4) provides that an organization designated by the Attorney General pursuant to Executive Order 10450 shall be presumed to be subversive until the contrary has been established.

Subsection (6) of Section 13b provides that reliance on the protection of the Fifth Amendment or of Article 31 of the Uniform Code of Military Justice (50 U. S. C. 544, 602) in refusing to complete Forms 98 and 398 is one of the activities which may result in a discharge less than honorable. Section 17b (1) (a) and (b) further provide that an inductee who refuses to sign Form 98 by pleading his constitutional privilege shall receive either an undesirable discharge (Section 17b (1) (a)) or a discharge characterized as "General, under honorable conditions" with the "security risk" notation already mentioned (Section 17b (1) (b)).

Sections 31c (1) and 32 provide that an inductee may ask for a hearing before a Field Board of Inquiry. Section 32c (4) provides that at such hearing such non-confidential witness who has given information adverse to the inductee and who has not indicated an unwillingness to appear shall be invited to appear, at his own expense. There is no subpoena power in either the Board or the inductee, and Section 32c (5) specifically provides that "CONFIDENTIAL sources

of information * * * are to be protected." (Emphasis in original.) Moreover, SR 605-200-1 (which sets forth the procedural rules governing the hearings) provides in Section 5a (2) that the Hearing Board may consider confidential records and the "nature of the information and methods by or sources from which it was obtained will not be disclosed."

As a matter of practice the Army never produces witnesses or documentary evidence in support of its "case" and in the instant cases the plaintiffs had been specifically advised that the Army does not contemplate calling any witnesses (Plaintiffs' App. 31a).[6] Under such circumstances, a hearing cannot consist of more than an effort by the inductee to refute charges made by unknown confidential informants.

After such hearing the Board makes its recommendations to the Army Review Board for post-audit which in turn makes the determination as to the type of the discharge to be given. Section 33. The inductee is not advised as to the recommendations by the Field Board to the Review Board. Section 32c (8) (a).

Questions Presented

1. Whether Army Regulation AR 604-10 is violative of the First Amendment to the Constitution in that it imposes restrictions in and punishment for the exercise by civilians of freedom of speech, the press and of assembly.

2. Whether Army Regulations AR 604-10 violates the Fifth Amendment to the Constitution in that it imposes punishment and impliedly prohibits the exercise of the privilege against self-incrimination.

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[6] At the hearings no witnesses were called, the confidential reports were not shown to the petitioners or their counsel.

3. Whether Army Regulation AR 604-10 is not unconstitutionally vague and indefinite in its criteria, definitions and procedures.

4. Whether Army Regulation AR 604-10 does not violate the Fifth Amendment by imposing arbitrary and unreasonable standards in inflicting punishment on Army personnel because of political activities of their kin and associates.

5. Whether Army Regulation AR 604-10 does not impose punishment retroactively in violation of the constitutional prohibition.

6. Whether Army Regulation AR 604-10 is not unreasonable in that it imposes arbitrary and unjustifiable sanctions, not reasonably required to accomplish legally requisite results.

7. Whether Army Regulation AR 604-10 violates the Fifth Amendment to the Constitution in that it imposes punishment without the fair hearing required by due process.

8. Whether Army Regulation AR 604-10 was promulgated pursuant to the provisions of the Administrative Procedures Act.

9. Does the United States District Court have jurisdiction to prevent the Department of the Army and The First Army of the United States from acting under and pursuant to an illegal and improper regulation, viz., Army Regulation AR 604-10.

10. Whether plaintiffs-appellants are required to exhaust their administrative remedies prior to instituting suit against the defendant-respondent.

11. Whether the Secretary of the Army is a necessary party defendant.

12. Whether Army Regulation AR 604-10 was authorized by Statute, Regulation or Resolution of the Congress.

Reasons for Granting the Writ

This petition brings before the Court, for the first time, the issue of the legality of the security program being administered by the Army of the United States. Every year perhaps 100,000 young men are subjected to the screening procedures hereinabove described. We would estimate that several hundred persons in the past three years have been involuntarily inducted into the Army and just as involuntarily discharged summarily with the "badge of infamy" of a discharge based on security charges, despite their exemplary Army service.

The Army has never, in this case, nor, so far as we know, in any other similar case pending,[7] sought to defend the screening program on its merits. Because we think that program to be illegally indefensible, we shall be quite brief in our discussion of the substantive legal issues presented by this record. The remainder of the argument shall be devoted to a consideration of the procedural issues on the basis of which the Army has, to date, successfully frustrated all efforts to secure a judicial review of those substantive issues.

I

An honorable discharge is a valuable property right. *U. S.* v. *Keating*, 121 Fed. Supp. 477. To deprive plaintiffs

[7] Such as *Schustack* v. *Herrin*, 136 Fed. Supp. 850, decided in the Court of Appeals, Second Circuit, simultaneously with this, and on the same grounds; *Harmon* v. *Brucker*, 137 Fed. Supp. 850 dismissed for lack of jurisdiction over the subject matter, and now pending on appeal; *Marshall* v. *Wyman*, 132 Fed. Supp. 169, dismissed on several grounds, all procedural; *St. Helen* v. *Wyman*, 130 Fed. Supp. 545, dismissed for lack of necessary party.

of such right, especially with the notation "pursuant to AR 604-10" affixed to their general or undesirable discharges, is severe punishment. It destroys "the reputation of men and their right to work—things more precious than property itself" (Mr. Justice Douglas in *Peters* v. *Hobby*, 349 U. S. 331, 351). Such a person, like one excluded from public employment for similar reasons, is marked for life. *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Peters* v. *Hobby*, *supra*, p. 347; and see footnote 1 to the dissenting opinion of Mr. Justice Douglas in *U. S.* v. *Ullmann*, U. S. , Oct. Term 1955, and footnote 2 to the opinion of the Court of Appeals for the Second Circuit in *Schustack* v. *Herren*, decided simultaneously with this case and incorporated by reference in the opinion herein (App. B, p. 26).

II

The Army security regulation AR 604-10 is substantively invalid for many reasons:

A. Underlying all other objections is the fundamental question of the authority of the Army to pass upon the activities of civilians prior to their connection with the Armed Forces. The Army may not try civilians for offenses committed during prior military service. (*U. S. ex parte Toth* v. *Quarles*, 350 U. S. 11.) The Army may not try a civilian for offenses committed in the course of a war. (*Ex parte Milligan*, 4 Wall. 2.) Thus it would appear *a fortiori* that the Army may not try soldiers for their pre-induction conduct as civilians.

B. AR 604-10 is illegal because it imposes sanctions against the plaintiffs on the basis of conduct alleged to have been engaged in by them years prior to their induction into the Army and prior to the inception of the Army's loyalty program. The regulation in question was promulgated on June 29, 1955; its predecessor Regulation SR 600-220-1 was promulgated on June 18, 1954. Most of the acts

alleged antedate both regulations; in some cases the allegations go back for a period of five or six years prior to the institution of any Army screening program. Even if the regulations themselves were valid, obviously they cannot be employed now to visit punishment upon the plaintiffs for conduct they are alleged to have engaged in long prior to the promulgation of the regulations. (*Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.)

C. As if this were not enough, the Army knew substantially all of the facts upon which it now seeks to proceed prior to the induction of the plaintiffs. If considerations of national defense could reasonably be urged in support of the entire screening program, the obvious solution would be for the Army to refuse to induct persons who might be security risks. To induct such persons and then only to discharge them with less than honorable discharges is not the fair play which the Court held, in *Galvan* v. *Press*, 347 U. S. 522, "is the essence of due process."

D. AR 604-10 includes, among other criteria, that of "guilt by kinship." See Sec. 13b(10), (11) and (12). In almost every one of the eight cases here, the allegations against plaintiffs include, among other things, continuing association with wives, parents or siblings who are alleged to have, at some time in their lives, engaged in political activity which the Army now considers improper. In one case, the allegations include the charge that a plaintiff has maintained a continuing relationship with a half-brother and half-sister who, more than fifteen years ago, belonged to an organization which the Attorney General now considers "subversive."

E. In measuring the validity of any restrictive legislation against the standards of due process, the most fundamental requirement is that the restriction must be reasonably necessary to accomplish a proper governmental purpose. A discharge less than honorable is not necessary to

accomplish such a purpose here. Assuming, *arguendo*, that the Army has the right to discharge persons on mere allegations of doubtful loyalty, certainly the security of the Army can be adequately protected by providing such persons with discharges based on the character of their service (i.e., in these cases, honorable discharges) rather than discharges based on the character of their pre-induction activity, the activity of their kin, or their reliance on their constitutional privilege against self-incrimination.

F. One of the allegations common to each of the eight plaintiffs is that, in filling out Army personnel forms, he relied upon the constitutional privilege afforded by the Fifth Amendment in refusing to answer certain questions. The Army evidently draws an inference from this reliance on the constitutional privilege. But such an inference is clearly improper. *Ullmann* v. *U. S.*, U. S. ; *Slochower* v. *U. S.* U. S. .

Moreover, the inference that the Army draws is a serious one. Under the provisions of AR 604-10, an inductee who relies on the Fifth Amendment is *ipso facto* ineligible to receive an honorable discharge[8] [See AR 604-10, Sec. 17b(1), (a) and (b)].

G. Except for plaintiffs' reliance on the privilege against self-incrimination, protected by the Fifth Amendment, and the political activities of plaintiffs' kin, all of the allegations against plaintiffs relate to activities protected by the First Amendment. It seems elementary that the Army may not condition the granting of an honorable discharge on the non-exercise, in the distant past, of rights guaranteed by the First Amendment. In no case is any of the plaintiffs charged with illegal activity.

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[8] We confess to grave doubt as to the precise terms of the regulations now in effect and we cannot find out. This in itself is an illustration of the failure of the Army to provide due process, procedurally speaking, and will be discussed below.

H. Finally, AR 604-10 is unconstitutionally vague. We shall not labor this point—a mere reading of the regulation is sufficient. For example, subdivisions (4), (7), (8), (9) and, by reference, (10), (11) and (12) of Section 13b of the regulation make use of the term "subversive" as a key word, although the word is nowhere defined. Expressions such as "sympathetic association" [see subdivisions (2), (4) and (10)], "close continuing association" [see subdivisions (11) and (12)], "sympathetic association with a movement which is communist" [subdivision (4)], "infiltrated by members of subversive groups" [subdivision (8)], abound. Every one of the plaintiffs is charged with disloyalty based, at least in part, on "sympathetic association" with members of his family who, in turn, are charged with having been "sympathetically associated" with organizations described as "subversive." All of this is so vague as to offer no guide at all to conduct. *U. S.* v. *Lattimore*, 215 F. 2d 847; *Connelly* v. *General Construction Co.*, 269 U. S. 385; *Winters* v. *People of the State of New York*, 333 U. S. 507.

III

It is not only due process in the substantive sense which is raised by the Army procedure. Procedural due process is involved as well. This is true in two major respects:

A. The "hearings" held by the Army under AR 604-10 were typical of loyalty-security hearings in general. In not one of the eight cases were any witnesses called by the Army. In each case the Army stated that it was relying on a "confidential file;" there was no opportunity for confrontation or cross-examination of witnesses. The defects of this procedure have been argued before the Court on numerous occasions and we shall not burden the Court with further discussions. See *Peters* v. *Hobby*, 349 U. S. 331; *Morgan* v. *U. S.*, 304 U. S. 1; cf. *Jay* v. *Boyd*, U. S. , Oct. Term, 1955.

The matter has likewise been considered by Courts of Appeals in *Parker* v. *Lester*, 227 F. 2d 708 and *Bailey* v. *Richardson*, 182 F. 2d 46.

B. An additional element of lack of due process, not clearly apparent at the outset of this litigation, has become more apparent as this case has progressed through the courts. The Army has apparently determined that its procedures are not subject to the Administrative Procedures Act (we think this in itself is a fatal defect in the Army procedures; see below). Furthermore, it makes and changes regulations without publishing them and without notifying anyone that the regulations have been changed. The result is that plaintiffs and counsel, in litigating this action, have never known, nor have we been able to find out, the precise terms of the Army regulations claimed to be applicable.

When this litigation was started, and through the proceedings in the District Court, AR 604-10 seemed to be the only applicable regulation. Under its terms an inductee who relied on the Fifth Amendment in filling out Army personnel forms could not under any circumstances secure better than a general discharge and he might secure an undesirable discharge [See Sec. 17b (1), (a) and (b)]. On the argument in the Court of Appeals, on April 6, 1956, the Presiding Justice called the attention of counsel to the fact that, several months prior, an Army representative appearing before a Congressional Committee had stated that the regulations were being changed. Counsel for the Government stated that he knew of no change in the regulation. About a week after argument in a "Supplemental Memorandum," the defendant referred to a "Department of the Army message 402295 dated 26 March 1956" which purported to set forth a "new policy." That Army message has, so far as we know, never been published. Evidently it purports to change AR 604-10 in that henceforth reliance upon the privilege against self-incrimination is merely one

item of "derogatory information" and the way is left open to the Army to retain persons who rely upon the privilege until they have completed the two years required by statute and then to give them a discharge based on the character of the service rendered.

The procedural and substantive content of AR 604-10 itself, however, does not seem to have been amended. Whether the Army has issued additional intra-departmental "messages" which implement its policy still further we do not know, nor is there any way in which we can find out. Inquiry at the office of the Adjutant-General in New York and at the office of the Judge Advocate General, First Army Headquarters, Governors Island, New York, has been equally unavailing so far as securing authoritative information as to the present status of the Army Regulations. The latter advises us that there has been no change in AR 604-10."

Due process requires that the regulations upon which an administrative agency proceeds, are to be public and not subject to change without at least some vestige of formality. We believe that the Administrative Procedure Act was expressly designed to take care of this situation, but whether or not that Act applies, certainly the due process required by the Constitution makes it necessary that the regulations upon which the Army acts should be available to all who are subject to its jurisdiction. Otherwise, as here, new regulations can be made public in the course of litigation, as the occasion arises.

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[8] See footnote 4 to the Court's opinion in *Schustack* v. *Herron*, incorporated by reference into the opinion in this case. It will be noted that the Court, in attempting to spell out the Army's current practice, was compelled to rely upon the New York Times for information as to the text of applicable regulations. The practice of the Army with respect to its regulations is discussed in interesting detail in a recent publication by the Workers Defense League, entitled "A Supplement to 'The Draftee and Internal Security.'" Copies of the report have been deposited in the library of the Court. See also footnote 3, page 3 of this Petition.

IV

The District Court granted summary judgment dismissing the complaint on the ground that it did not have jurisdiction over the subject matter of the suit. Although the Court of Appeals refused to pass on that argument, the issue has been raised and may be raised again. The District Court conceded that the question of its jurisdiction to review the nature of a discharge certificate has never been passed upon by this Court. Cf. *Patterson* v. *Lamb*, 329 U. S. 539.

With all respect to the opinion of the District Court, we suggest that its denial of jurisdiction is contrary to one of the basic principles of our Government, namely, that ours is a civilian government, and that the civilian courts may review the action of the Army when such action violates either statute law or the Constitution. We should have thought that this issue had been settled at least since *Ex parte Milligan*, *supra*. See, for example, *Mitchell* v. *Harmony*, 13 How. 115; *Dynes* v. *Hoover*, 20 How. 65; *Burns* v. *Wilson*, 346 U. S. 137; *Hirshberg* v. *Cooke*, 336 U. S. 210; *U. S.* v. *Hiatt*, 141 F. 2d 664; *Shapiro* v. *U. S.*, 69 Fed. Supp. 205.

Gentila v. *Pace*, 193 F. 2d 1924 and *Davis* v. *Woodring*, 111 F. 2d 523, relied upon by the District Court, are not in point. Plaintiffs do not seek judicial review of an administrative finding of fact, nor do they challenge an administrative interpretation of the regulations.

V

The Court of Appeals dismissed this action on the ground that the Secretary of the Army was an indispensable party defendant. We submit that in so doing the Court disregarded the holdings of this Court in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, and *Williams* v. *Fanning*, 332 U. S.

490. Furthermore, the Court misapprehended the procedure followed by the Army in such cases.

The basic purpose of this suit is to prevent the issuance of a discharge less than honorable to the plaintiffs.[10] It is true that the policy determination of what type of discharge shall be given under these circumstances is made by defendant's superiors. It was also true that the basic policy decisions in the *Shaughnessy* and *Williams* cases, *supra*, were made by the Attorney General and the Postmaster General. In this case, as in *Shaughnessy* and *Williams*, however, the administration of the policy determination is assigned to local administrative officials. If the plaintiffs are to be mustered out of the Army prior to the expiration of their usual term, that must be done through the First Army Command, the defendant in this case. If the major commander is enjoined from issuing undesirable discharges to plaintiffs, the decree of the Court will be effected. As we understand the rulings of this Court in the *Shaughnessy* and *Williams* cases, that is the primary test.

[10] The Court, in the *Schustack* opinion, incorporated by reference into this case, says, "Plaintiff, in effect, seeks to ensure the issuance to him of an honorable discharge." That may be true in *Schustack* it is not true in this case. Plaintiffs seek only an injunction to restrain the Army from discharging them pursuant to AR 604-10. The ultimate result which plaintiffs hope to achieve through this lawsuit is that they will be permitted to serve their full two years in the Armed Forces and that at the end of that time they will receive a discharge based on the character of the service performed. The first sentence of § 459 of the Universal Military Training and Service Act (50 U.S.C. App. 451, 459) requires that the certificate of discharge for those who complete their period of training and service shall be such as will reflect the character of such service. It reads, in relevant part:

> "Any person inducted into the Armed Forces under this Title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 4(b) [Section 454(b)] shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained."

A completely different situation would be presented were plaintiffs asking for affirmative relief which was beyond the power of defendant.

The Court below further misapprehended one additional aspect of Army procedure. The Court conceded, *arguendo*, that it could enjoin a hearing, since that was a local function. But, says the Court, the Army can issue a discharge less than honorable without a hearing, and so an order enjoining a hearing "would resemble the firing of a blank cartridge" (See Schustack, p. 1525, pamphlet opinion).

If the Army wishes to discharge the plaintiffs under some regulation other than AR 604-10, it may do so and this action may become moot. But the Army cannot discharge anyone pursuant to AR 604-10 without a hearing. AR 604-10 specifically so states and the ability of the Army to discharge under some other regulation without a hearing is not raised by this record.

VI

Both the Court of Appeals and the District Court raised the question as to the standing of plaintiffs in view of the fact that they have not exhausted their administrative remedies although neither Court found that the failure to exhaust such remedies was the principal reason for dismissing the complaint. We do not believe that the doctrine of exhaustion of administrative remedies applies to this case.

Under appropriate circumstances administrative remedies may be dispensed with as prerequisites to judicial review. Davis, The Administrative Law, 614 ff; Exhaustion of Administrative Remedies, 39 Cornell Law Quarterly 273.

A. Where the administrative remedy itself is a primary source of invalidity in the proceedings, it would be futile to require its exhaustion, for it provides no remedy at all.

See *Parker* v. *Lester*, 227 F. 2d 708, where the Court considered a situation substantially identical to that in the present case. There, too, the Government was proceeding under a set of "loyalty-security" regulations which had the effect of stamping as security risks large numbers of persons who came within its scope. The regulations were defective in that they did not provide for confrontation, for cross-examination or for any of the other usual characteristics of due process. The Court held that under such conditions administrative remedies need not be exhausted.

In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557, this Court held that where it is argued that the action of an administrative agency is void, it is unnecessary that a plaintiff should have exhausted his administrative remedies.

B. Where the regulations under which an administrative agency purports to act are themselves unconstitutional and invalid, exhaustion of administrative remedies is not required in the absence of specific authority on the part of the agency to pass on their validity (authority which is lacking in this case). An administrative agency invested with discretion has no jurisdiction to entertain constitutional questions. (*Engineers Public Service Co.* v. *SEC*, 138 F. 2d 936, 952, 953, dismissed as moot, 332 U. S. 788; *Panitz* v. *District of Columbia*, 112 F. 2d 39, 41, 42.)

C. There is no factual issue which the administrative procedure might determine; the only issue is one of law. (*Great Northern Ry. Co.* v. *Merchants Elev. Co.*, 259 U. S. 285; *Skinner & Eddy Corp.* v. *U. S.*, *supra*.)

D. Where irrevocable damage will result, the validity of an administrative regulation may be reviewed judicially without exhaustion. (*Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407.)

VII

There is no statutory authority for AR 604-10. That regulation is the Army implementation of the Department of Defense Directive No. 5210.9. That directive cites as authority for its issuance, Public Law 733 and Executive Order 10450. However, both the Public Law and the Executive Order cited, by their terms, expressly apply to civilian employees. They do not authorize loyalty procedures for military personnel.

Nor is there any other statute which can serve to legitimatize AR 604-10. The Universal Military Training and Service Act of 1948, 50 U. S. C. App., § 451, 454, (b), merely provides that each person inducted into the Armed Forces shall serve for 24 months "unless sooner released, transferred or discharged in accordance with procedures prescribed by the Secretary of Defense." This hardly gives to the Secretary of Defense the right to promulgate a complete set of security regulations such as those under consideration here.

VIII

Regulation AR 604-10 violates the Administrative Procedure Act (5 U. S. C. 1001 ff). That Act provides in § 1002:

> "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—
>
> "(a) Every agency shall separately state and currently publish in the Federal Register * * * (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the formal procedures available as well as forms and instructions as to the scope and contents of all

papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

Regulation AR 604-10 does not come within either exception to the publication provision. It affects the three million members of the Armed Forces and countless millions of other persons who are not yet in the Armed Forces but who are subject to induction.

It is clear that Congress intended that the Army should be subject to the publication requirements of § 1002, for § 1001 of the Act excuses the military from other requirements of the law but specifically includes it in the publication provision.

However, the Army has never published this regulation in the Federal Register. Cf. 32 C. F. R. 500 et seq. and especially 582 where other Army regulations relating to the discharge of members of the Armed Forces are published.

As is pointed out above, the problem raised is not a technical one. Throughout this litigation plaintiffs and counsel have had considerable difficulty in determining the precise nature of the regulations applicable to them. The plaintiffs did not have actual notice of the regulations until the "letters of allegation" were served upon them long after induction; because of the failure of the Army to comply with the provisions of the Administrative Procedures Act, they did not have constructive notice either. (*Hotch* v. *U. S.*, 212 F. 2d 280).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT L. COLLOMS,
STANLEY FAULKNER,
RABINOWITZ & BOUDIN,
Attorneys for Petitioners.

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of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 372—October Term, 1955.

(Argued April 6, 1956 Decided June 1, 1956.)

Docket No. 24055

THEODORE BERNSTEIN, STANLEY HAUSER, BERTRAM LESSUCK, DAVID LUBELL, JOHNATHAN LUBELL, BERNARD RADOFF, SAMUEL SUCKOW, RUDOLPH THOMAS,

Inductees in the Army of the United States,

Plaintiffs-Appellants,

—v.—

LIEUTENANT GENERAL THOMAS W. HERREN, COMMANDING GENERAL, FIRST ARMY, FORT JAY, GOVERNOR'S ISLAND, NEW YORK,

Defendant-Respondent.

Before:

FRANK, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, entered by Judge Ryan, granting defendant's motion for summary judgment dismissing the complaint. Affirmed.

RABINOWITZ & BOUDIN (New York, New York), Stanley Faulkner (New York, New York), Albert L. Colloms (New York, New York), *Attorneys for Plaintiffs-Appellants.*

PAUL W. WILLIAMS, United States Attorney; Harold J. Raby, Assistant United States Attorney, of Counsel, *Attorneys for Defendant-Respondent.*

FRANK, *Circuit Judge*:

The facts here, set forth fully in opinions by Judge Edelstein, 136 F. Supp. 493 (denying a request for a preliminary injunction by plaintiffs and a motion to dismiss by defendant) and Judge Ryan, F. Supp. (S. D. N. Y. March 8, 1956) (granting defendant's motion for summary judgment dismissing the complaint), are similar to those in *Schustack* v. *Herren, et al.*, decided today, and has been considered by us as a companion case. Plaintiffs here, as in Schustack, seek declaratory and injunctive relief concerning the legality of the proposed determination by subordinates (members of the Field Board convened pursuant to AR 604-10) of defendant, the Commanding General of the First Army, concerning the character of plaintiffs' discharges. They appeal from the order of the district court granting defendant's motion for summary judgment dismissing the complaint because the action was prematurely brought and for lack of jurisdiction.

This case is in part governed by our decision, in *Schustack* v. *Herren, et al.* However, Schustack does not cover one phase of the instant case: The defendants here are charged with post-induction conduct consisting of their refusal, authorized by a regulation, to answer certain ques-

tions, after induction, on the ground of the self-incrimination privilege accorded by the Fifth Amendment.[1]

We must affirm solely for the reasons stated in points 3 and 4 of our opinion in the *Schustack* case, i.e., the absence of the superior officers who alone have the authority to issue discharges.[2] In their absence from the suit, neither an injunction nor a declaratory judgment can be effective. We need not reach two questions inherent in the facts of this case—whether, under the regulations, this particular kind of post-induction conduct would result in the issuance of less than honorable discharges, and whether the issuance of such discharges would violate plaintiff's constitutional rights.

Affirmed.

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[1] Here, unlike Schustack, the officers who have authority to issue Certificate of Service (DD Form 217A) to plaintiffs are within the jurisdiction of the district court. However, as plaintiffs have not complained of the Army's failure to issue them Certificates of Service (and indeed, cannot so complain until their separation from active service), we need not here consider that issue.

[2] *Blackmar* v. *Guerre*, 342 U. S. 512; *Burns* v. *McCrary*, 229 F. 2d 286 (C. A. 2); *Reeber* v. *Rossell*, 200 F. 2d 334 (C. A. 2); *Marshall* v. *Wyman*, 132 F. Supp. 169; *Harris* v. *Bayer*, 18 F. R. D. 392; *cf. United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C. A. 2).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 277—October Term, 1955.

(Argued March 13, 1956 Decided June 1, 1956.)

Docket No. 23951

ROBERT E. SCHUSTACK,

Plaintiff-Appellant,

—v.—

LT. GENERAL THOMAS W. HERREN, United States Army, Individually and as Commanding General, First Army, LT. COL. DONALD K. HUGHES, United States Army, Individually and as President of the First Army Field Board of Inquiry, LT. COL. JOE E. STARNS, United States Army Reserve, and LT. COL. EMIL SIMMONS, United States Army Reserve, Individually and as members of the First Army Board of Inquiry,

Defendants-Appellees.

Before:

FRANK, LUMBARD and WATERMAN,

Circuit Judges.

Appeal from an order of the district court denying appellants' motion for a temporary injunction and grant-

ing respondents' cross-motion to dismiss the complaint. Affirmed.

DICKSTEIN, SHAPIRO & FRIEDMAN (New York, New York), David I. Shapiro and Harold Friedman, of Counsel, *Attorneys for Plaintiff-Appellant.*

PAUL W. WILLIAMS, U. S. Attorney for the Southern District of New York, Harold J. Raby, Assistant U. S. Attorney, Arthur B. Kramer, Assistant U. S. Attorney, *Attorneys for Defendants-Appellees.*

FRANK, *Circuit Judge*:

The facts in this case are amply set out in Judge Sugarman's opinion, reported at 136 F. Supp. 850, and we need not repeat them here.

1. No one can reasonably doubt that the Army has the power to discharge without a hearing and without assigning any reason; such power is indispensable to the effective management of the armed services and to the national defense; and with the exercise of that power no court can properly interfere. But plaintiff argues—contrary to Judge Youngdahl's decision in *Harmon* v. *Brucker*, F. Supp. (D. C. D. C., January 24, 1956)—that the federal courts have jurisdiction to review the issuance by the Army of a less than honorable discharge, on account of lawful pre-induction conduct, when such a discharge constitutes a violation of the dischargee's constitutional rights. See *Marshall* v. *Wyman*, 132 F. Supp. 169, 173.[1]

[1] The Supreme Court has not yet spoken on the question of "whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificate issued to soldiers * * *." *Patterson* v. *Lamb*, 329 U. S. 539, 542.

Plaintiff's argument comes to this: (a) The issuance of a less than honorable discharge, for conduct preceding plaintiff's induction and unrelated to plaintiff's army service, has nothing to do with the management of the armed services, is extraneous to the Army's legitimate functions, and lies wholly beyond its powers. (b) A less than honorable discharge may have important adverse effects on a veteran's eligibility for various benefits under federal and state law,[2] and on his success in obtaining private or governmental employment.[3] (c) Besides this direct pecuniary harm, it involves a social stigma likely to harm plaintiff substantially. (d) Such effects may be aggravated by the requirement that the discharge papers of persons who do not complete their normal tour of duty, but are separated pursuant to AR 604-10 (the Army regulations relating to security risks), contain the statement "AR 604-10 applies," thus publicly proclaiming that the Army considers such persons to be security risks. See AR 604-10 Par. 19(b). (e) Any regulation which authorizes such a

[2] Although a General Discharge (Under Honorable Conditions) apparently entitles a veteran to most, if not all, benefits under federal law, the statutes of New York, of which plaintiff is a resident, requires that a veteran have an Honorable Discharge in order to be eligible for various benefits under state law. See e.g. New York Military Law Sections 245, 250; New York General Municipal Law Section 148; New York Education Law Section 609; New York General Business Law Section 32.

An Undesirable Discharge has further adverse consequences with regard to state benefits. See e.g. New York Civil Service Law Section 21; New York Educational Law Section 608. In addition, such a discharge deprives the veteran of important benefits under federal law. See 5 U. S. C. Section 851; 38 U. S. C. Section 691, as amended. See also Chart prepared by Judge Advocate's Office of the Army, inserted in Hearings, Senate Armed Services Committee on S. 3096, 83d Congress, 2d Session, March 18, 1954, pp. 28-29; American Law of Veterans (1946) pp. 1100-1106.

[3] See testimony of Mr. Barry Miller before the Hennings Committee Hearings, Sub-Committee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94, 84th Congress, 2d Session, November 18, 1955, pp. 393 ff, concerning the difficulties incurred by a veteran, given a less than honorable discharge for security reasons, in obtaining a position with a large corporation doing government defense work.

substandard discharge, merely because of lawful pre-induction conduct or associations, is unconstitutional. See *Bernstein* v. *Herren*, 136 F. Supp. 493; *cf. Harmon* v. *Brucker*, F. Supp. (D. C. D. C. January 24, 1956). We need not and do not consider that argument, for reasons stated *infra*.

2. The trial judge assigned as one reason for dismissing the suit that it had been begun prematurely, *i.e.*, that plaintiff had not yet received a less than honorable discharge and hence, no deprivation had occurred. This reason receives marked emphasis from facts, of which we take judicial notice, not called to the trial judge's attention. Those facts indicate that it is by no means certain that the regulations now in effect, as construed by the army officials, will necessarily lead to the issuance to plaintiff of less than an honorable discharge. Under recent amendments of Defense Department Directive No. 5210.9, on which the army regulations relating to security discharges are based, the army will take into consideration the service record of plaintiff in determining the character of his discharge, and it is possible that he will receive an Honorable Discharge, despite the "derogatory" information concerning his pre-service conduct and associations.[4] Ap-

[4] At the hearings before the Hennings Committee, Hearings on Security and Constitutional Rights, before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, pursuant to S. Res. 94, 84th Congress, 2d Sess., November 14-29, 1955, Government and army officials and other experts in the field, testified as to the army's practices, past and present, with respect to the determination of the character of a serviceman's discharge when he is separated for security reasons.

Before November 16, 1955, if the army had sufficient substantially derogatory information concerning a serviceman to require that he be discharged as a security risk or put on limited service, or if the serviceman raised his Fifth Amendment privilege in refusing to complete the army's loyalty questionnaire (DD Form 98), he received a less than honorable discharge. Testimony of Rowland Watts, pp. 360-361, 372, 408-409; Memorandum dated February 3, 1955 by

parently, plaintiffs were unaware of these amendments. (Perhaps, all else aside, the case is moot. The shifting and uncertain rulings, not generally published, leave us in doubt on that score.)

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former Secretary of the Army, Stevens, at p. 430 of the Hearings. Letter from Secretary of Defense Wilson to the Committee, p. 467; Testimony of Mr. Mansfield D. Sprague, General Counsel, Defense Department p. 477, AR 604-10 Paragraphs 3 (b), 19 (a), 17 (b) (1). Even where the army knew of the derogatory information prior to induction (either through investigations or information revealed by the inductee himself in answering the army's questionnaires), or where an inductee raised his constitutional privilege and refused to complete the army's DD Form 98 prior to induction, if these men were inducted, they could receive, only a less than honorable discharge. Testimony of Rowland Watts, p. 359; Letter from Secretary Wilson to the Committee, p. 466.

On November 16, 1955, Defense Department Directive No. 5210.9 (which is the basis of the army's regulations on this matter, i.e. AR 604-10) was amended to provide that, if the army receives derogatory information concerning a prospective inductee, or if an individual, before induction, refuses to complete DD Form 98, an investigation will be made prior to induction. If this investigation reveals that the presence of the individual would not be clearly consistent with national security he will not be inducted. Letter from Secretary Wilson to the Committee, pp. 466-467; Directive No. 5210.9, VIII, E, F, as amended on November 16, 1955, NBA, Government Security and Loyalty 31:56. However, it is possible under this amended Directive that one who raises his Fifth Amendment privilege in refusing to complete the army's DD Form 98 will be inducted, since the result of the investigation might show that his presence in the services would not be inconsistent with national security. Such a person, even under the new November 16 policy, could never get an honorable discharge. Letter from Secretary Wilson to the Committee, p. 467; AR 604-10 Para. 17 (b) (1).

Thus, as of November 16, 1955, those who completed their DD Form 98's truthfully, but concerning whom significant derogatory information had been received (and, if received before induction, was not sufficient to establish that the presence of the inductee in the services would be inconsistent with the national security), would receive a discharge at the time of their separation whose character would be determined not only on the basis of the derogatory information (as previously) but also on the basis of their service record. Such persons would not necessarily receive less than honorable discharges. Letter from Secretary Wilson to the Committee, p. 467; Testimony of Mr. Sprague, General Counsel, Defense Department p. 484; Testimony of Mr. Stephen S. Jackson, Assistant General Counsel, Defense Department, p. 469.

3. In *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 773, the Court said: "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and threatened or impending injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." After

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On January 11, 1956, Directive No. 5210.9 was again amended so that now, any inductee who is accepted into the services after an investigation, required by the Directive, has been made, is to be given a discharge "predicated on the character of service rendered. 'Character of Service' should be interpreted to include those factors normally taken into account in determining the character of separation where no adverse security finding has been made as well as any reasonably substantiated derogatory information concerning (a) subversive activities occurring during his period of service, and (b) falsification in connection with security matters, occurring during his period of service or pertaining to his entry into the service. The character of separation shall not take into account any limitation on performance of duty imposed for security reasons." Hearings at p. 495.

In a letter to the Committee dated January 18, 1956, in which Mr. Sprague, General Counsel of the Department of Defense informed the Committee of the new amendment to Directive No. 5210.9, and explained the new Defense Department policy, he said that those who were inducted prior to November 10, 1955 but had not yet received a final discharge, would receive discharges whose character would be "determined under the current Department of Defense policy regarding inductees." Individuals "who complete their term of active duty will be awarded separations based on the character of their service, while persons discharged prior to the termination of their tour of active duty will receive a separation based on the character of their service as well as relevant substantiated derogatory information." Hearings, pp. 494-495.

On March 26, 1956, the Department of the Army issued message 402295 to all army commands, advising them as to the current policy governing the character of discharge:

> "* * * 2. The following policy implements recent changes made by Department of Defense in the Military Personnel Security Program as it applies to characterization of discharge. Pending changes to paragraph 17b and 19a AR 604-10 this policy will guide Commanders and Field Boards of Inquiry in making recommendations on type of discharge:

making this statement, the Court pointed out that a remedy provided by Congress should be preferred, and continued: "To this, of course, should be added the further qualification that following the prescribed remedy upon showing made, will not certainly or probably result in the destruction of substantial rights."

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a. Individuals who complete their term of active duty service will be awarded a separation based on the character of service performed.

b. Individuals discharged prior to completion of their term of active duty service will be discharged with the character of separation based on the gravity of the substantiated derogatory information (occurring prior to and during his period of service) requiring their discharge and upon the character of service performed.

c. Individuals discharged from United States Army Reserve prior to the completion of their term of Reserve service will be discharged with the character of separation based on the gravity of the substantiated derogatory information (occurring prior to and during his period of service) requiring their discharge and upon the character of service performed.

d. Character of service will be interpreted to include those factors normally taken into account in determining the character of separation where no adverse security finding has been made, as well as any reasonably substantiated derogatory information concerning:

(1) subversive activities occurring during his period of service, and

(2) falsification in connection with security matters occurring during his period of service or pertaining to his entry into the service. The character of separation shall not take into account any limitations or performance of duty imposed for security reasons."

On April 27, 1956, Secretary of the Army Brucker, in answer to an "urgent need for revision" of present army policies, issued a directive relating to the "investigation, evaluation and adjudication of personnel security cases * * *" N. Y. Times, April 28, 1956 p. 8 Col. 3-4. It states, in part:

"2) The criteria set forth in AR 604-10, lists activities and associations which warrant initiation of action to effect a determination as to whether acceptance or retention within the Army establishment is warranted. However, the mere existence of information falling within the scope of these criteria does not, in

We shall assume, *arguendo*, that that doctrine applies here, and that, especially because the delay incident to that exhaustion of remedies may well involve serious harm to plaintiff, he need not exhaust them before bringing suit. We shall also assume, *arguendo*, that plaintiff is certain to receive a less than honorable discharge (although, as indicated *supra*, we think that the army's present

itself, constitute a bar to acceptance and retention. The determination that acceptance or retention is not clearly consistent with the interests of national security must be based upon competent information which indicates, or from which it may be logically inferred, that the individual is motivated or influenced by, or is sympathetic to subversive aims or ideologies.

"3) In determining the risks involved in retaining an individual in, or eliminating him from the Army, or placing him on specially controlled duties, it is directed that the following factors be carefully considered.

(a) Whether or not the individual made full voluntary disclosure of *substantial* derogatory information.

(b) The age at which the derogatory action took place.

(c) The period of time over which the derogatory action took place.

(d) Whether membership in a cited organization was the result of actual belief in, or knowledge of, the subversive nature of the organization, or was the result of a desire for social activities, or misguided belief in *alleged* patriotic motives espoused by the organization. (It should be remembered that Communist-front organizations were designed to ensnare persons by appealing to patriotic motives or other high ideals while the true nature of the organization was disguised.)

"4) The fact that an individual's relatives or associates are, or have been engaged in activities or associations listed in the criteria will be used as an allegation only if there is available information which indicates, or from which it may be logically inferred, that the individual is sympathetically influenced in thought or action by the subversive activities or ideologies of his relatives or associates.

"5) An individual will not be held accountable for the *pro-communist* or subversive opinions or activities of his character references, unless there is available competent information which indicates or from which it can logically be inferred, that he not only had knowledge of but sympathizes with or is influenced in

policy no longer makes such a result inevitable). Even so, we must affirm: (a) Plaintiff, in effect, seeks to ensure the issuance to him of an honorable discharge. (b) Only defendants' superiors have authority to issue a discharge. (c) The district court had no jurisdiction over those superiors, who were not parties to the suit. It therefore could not grant the desired relief.[5]

4. It might be urged that, if the hearing were certain to terminate in less than an honorable discharge, the dis-

thought or action by those opinions or activities of such character references."

From these most recent declarations of policy, it would appear that, hereafter, all servicemen (even those who were inducted prior to November 10 without a pre-induction investigation, but who have not yet been finally discharged) who are separated after the completion of their active service, will receive a Certificate of Service based solely on their service record, without regard to pre-induction conduct or associations, or to the assertion of their Fifth Amendment privilege in refusing to complete DD Form 98. Also, if they complete their period of enrollment in the Reserves, they will be given a final discharge on the same basis. However, if they engage in subversive activities or falsely answer questions relating to security matters while in the service (at least in active service), this will be taken into consideration in determining the character of separation.

If an individual is separated prior to the termination of his period of active service or prior to the completion of his Reserve obligation, it is still not certain that he will be given a less than honorable discharge. The character of his discharge will be determined on the basis of his service record and the derogatory information (apparently not including the assertion of his Fifth Amendment privilege in refusing to complete DD Form 98). And the "investigation, evaluation, and adjudication" of future cases will be governed by the Army's directive of April 27, 1956 providing for a fairer and more accurate evaluation of an individual's loyalty. It is possible that, in spite of the existence of derogatory information, an individual will receive an honorable discharge.

[5] *Blackmar* v. *Guerre*, 342 U. S. 512; *Burns* v. *McCrary*, 229 F. 2d 286 (C. A. 2); *Reeber* v. *Rossell*, 200 F. 2d 334 (C. A. 2); *Marshall* v. *Wyman*, 132 F. Supp. 169; *Harris* v. *Bayer*, 18 F. R. D. 392; cf. *United States ex rel Vassel* v. *Durning*, 152 F. 2d 455 (C. A. 2).

trict court could validly enjoin the holding of the hearing, even absent the defendants' superiors. But we interpret the regulations to mean that, if no hearing were held, those superiors could and would proceed, without a hearing, to issue a discharge less than honorable. Accordingly, the issuance of such an injunction would resemble the firing a blank cartridge.

For the same reason, we do not consider plaintiff's contention that, under the regulations, the hearing—especially because of want of confrontation and of cross-examination—will violate the requirements of procedural due process.

5. Plaintiff contends that, when he was separated from active service, he was entitled to a Certificate of Service and to a Records of Service. However, even if we assume plaintiff is entitled to these documents,[6] the defendants

[6] Certificates of Service (DD Form 217A) are ordinarily given to servicemen at the time of their separation, after completing their period of active service, AR 615-360 Para. 5 (a). A Discharge Certificate (DD Form 256A, DD Form 257A, DD Form 258A, DD Form 259A, DD Form 260A, depending on the character of discharge) is not normally given until the completion of the six year obligatory enrollment in the Reserves under the Selective Service and Training Act of 1952. The Army can, for one of several reasons (e.g. medical reasons, hardship, inaptitude, etc.), finally discharge a man before the expiration of his period of active and reserve duty. In such a case, the character of the discharge is governed by AR 615-360.

The Certificate of Service (DD Form 217A), like the Discharge Certificate, contains a designation of the character of the separatee's army service. This Certificate is now customarily withheld, in cases such as this, where an AR 604-10 proceeding is pending or initiated at the time the individual is released from active duty into the Reserves. The separatee is given only his Record of Service (DD Form 214) with "To be determined" in the space provided on that form for the designation of the individual's character of separation.

It is arguable that the applicable statute and regulations require that the officials at a serviceman's separation center give him a Certificate of Service (Form 217A) at the time of his separation, upon the completion of his tour of active duty. See 50 U. S. C. App. Section 459(a); AR 615-360 Para. 5; SR 615-360-1 Paragraphs 10, 11, 13.

cannot issue them; they must be issued by the appropriate officers at the place of separation, Aberdeen Proving Grounds, in Maryland, and those officials are not parties to plaintiff's suit. Wherefore, the district court could not enter an effective order in this respect.[7]

Affirmed.

LUMBARD, *Circuit Judge* (concurring):

For the reasons set forth in Judge Sugarman's opinion, 136 F. Supp. 850 and on the authority of *Blackmar* v. *Guerre*, 342 U. S. 512 (1952); *Burns* v. *McCrary*, 229 F. 2d 286 (2 Cir. 1956); *Reeber* v. *Rossell*, 200 F. 2d 334 (2 Cir. 1952); *Marshall* v. *Wyman*, 132 F. Supp. 169 (D. C. N. D. Cal. 1955); *Harris* v. *Bayer*, 18 F. R. D. 392 (D. C. E. D. Pa. 1955); cf. *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (2 Cir. 1945), the order of the District Court denying appellant's motion for a temporary injunction and the order of the District Court granting respondents' cross-motion to dismiss the complaint should be affirmed.

I refrain from concurring in Judge Frank's discussion of other matters as it seems to me that such discussion is not necessary to the decision and regards matters concerning which I do not feel that the Court is or needs to be fully informed.

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[7] See cases cited in note 5 *supra*.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulation involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Allen v. *Grand Central Aircraft Co.*, 347 U. S. 535	10
Blackmar v. *Guerre*, 342 U. S. 512	5, 6
Bolger v. *Marshall*, 193 F. 2d 37	10
Burns v. *McCrary*, 229 F. 2d 286	5
Davis v. *Woodring*, 111 F. 2d 523	10
Gentila v. *Pace*, 193 F. 2d 924	10, 11
Gusik v. *Schilder*, 340 U. S. 128	9
Harmon v. *Brucker*, 137 F. Supp. 475	11
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	8
National Lawyers Guild v. *Brownell*, 225 F. 2d 552, certiorari denied, 351 U. S. 927	9, 10
Nordmann v. *Woodring*, 28 F. Supp. 573	11
Parker v. *Lester*, 227 F. 2d 708	8
Patterson v. *Lamb*, 329 U. S. 539	10
Reaves v. *Ainsworth*, 219 U. S. 296	10
Reeber v. *Rossell*, 200 F. 2d 334	5
Schustack v. *Herren*, 234 F. 2d 134	8, 9
Shaughnessy v. *Pedreiro*, 349 U. S. 48	6
United States ex rel. Creary v. *Weeks*, 259 U. S. 336	10
Williams v. *Fanning*, 332 U. S. 490	6, 7

396060—56——1

Statutes:	Page
5 U. S. C. 191a	9, 13
10 U. S. C. 652a	10, 13
38 U. S. C. 693 (h)	9, 12
Universal Military Training and Service Act, 50 U. S. C. App. 451, *et seq*	3
Miscellaneous:	
Army Regulations No. 604–10 (Military Personnel Security Program):	
Paragraph 13b	9
Paragraph 31	3
Paragraph 31c (1)	3
Paragraph 32	4
Paragraph 33	4
Paragraph 35c	6
D. A. Message 402295, dated March 26, 1956	9
3 Moore, *Federal Practice*, ¶ 19.07	5
Special Regulation 600–220–1	3

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 255

THEODORE BERNSTEIN, STANLEY HAUSER, BERTRAM LESSUCK, DAVID LUBELL, JONATHAN LUBELL, BERNARD RADOFF, SAMUEL SUCKOW, RUDOLPH THOMAS, PETITIONERS

v.

LIEUTENANT GENERAL THOMAS W. HERREN, COMMANDING GENERAL, FIRST ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 63a–73a), denying respondent's motion to dismiss, is reported at 136 F. Supp. 493. The supplemental opinion of the same court, denying petitioners' motion for a preliminary injunction, is reported at 136 F. Supp. 499. The opinion of the District Court (R. 44a–47a), granting defendant's motion for summary judgment, is reported at 141 F. Supp. 78. The opinion of the

Court of Appeals (Pet. App. A), which affirmed the judgment of the District Court, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1956 (Pet. App. A). The petition for a writ of certiorari was filed on July 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners' complaint was subject to dismissal for failure to join indispensable parties to the action.

2. Whether petitioners' complaint was subject to dismissal for failure to exhaust administrative remedies available to them.

3. Whether petitioners' complaint was subject to dismissal for lack of jurisdiction over the subject matter.

STATUTES AND REGULATION INVOLVED

Copies of Army Regulations (AR) 604–10 (Military Personnel Security Program) are filed separately with this brief in original form. Pertinent portions of 38 U. S. C. 693h, 5 U. S. C. 191a, and 10 U. S. C. 652a are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

Petitioners[1] are inductees in the Army of the United States stationed at Fort Dix, New Jersey.

[1] The case appears to have become moot as to petitioners Lessuck and Thomas, who were transferred to the Army Reserve at the completion of their two-year terms of active service on July 14, 1956, with honorable separations from active duty. See p. 8, *infra*.

They brought this action in the District Court for the Southern District of New York for a declaratory judgment against respondent, the Commanding General of the First Army, that proposed administrative proceedings relating to them, to be conducted in accordance with AR 604–10, were unauthorized by law and in violation of their constitutional rights (R. 2a–7a).

Petitioners were inducted into the Army under the Universal Military Training and Service Act, 50 U. S. C. App. 451, *et seq.*, at various times between April and December, 1954 (R. 16a–20a). In the spring and summer of 1955, each was notified by letter from The Adjutant General that, in accordance with AR 604–10,[2] a determination would be made as to whether his retention in the Army would be inconsistent with the interests of national security in the light of certain stated derogatory information (R. 3a). Hearings before a Field Board of Inquiry were requested in accordance with Paragraph 31 of the Regulations[3] (R. 4a), but the present action was commenced prior to the holding of those hearings.

The District Court denied petitioners' motion for a preliminary injunction (136 F. Supp. 499) and respondent's cross-motion to dismiss the complaint (R. 63a–73a). A motion by petitioners in the Court of Appeals for the Second Circuit for an injunction

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[2] The proceedings were actually begun pursuant to Special Regulation 600–220–1, which was the forerunner of, and substantially identical with, AR 604–10.

[3] Petitioner Bernstein submitted a letter of rebuttal in lieu of a request for hearing, in accordance with Paragraph 31c (1) of the Regulation (R. 4a).

pending appeal was denied by Circuit Judge Lumbard, and a similar application in this Court was denied by Mr. Justice Harlan. Petitioners then moved for summary judgment in the District Court, the respondent, in the meantime, having answered the complaint. Respondent's cross-motion for summary judgment was granted by the District Court on the grounds that petitioners had failed to exhaust their administrative remedies and that the court lacked jurisdiction to review or control the Army's action in determining the type of discharge certificates to be issued (R. 44a–47a). An appeal was taken to the Court of Appeals, which issued an order allowing the Army to proceed with its hearings but forbidding any action to be taken thereon until the court's decision was rendered. The Court of Appeals affirmed the judgment of the District Court because of "the absence of the superior officers who alone have the authority to issue discharges" (Pet. App. A, p. 25).

While the appeal was pending, hearings were conducted by a Field Board of Inquiry appointed by the Commanding General at Fort Dix pursuant to Paragraph 32 of AR 604–10. The findings and recommendations of this Board were transmitted through command channels to The Adjutant General for review in the Department of the Army in accordance with Paragraph 33 of the Regulation.[4]

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[4] We have been advised that the Army Security Review Board has completed its review of all cases except that of petitioner Radoff. The 24-month periods of active duty for petitioners Hauser, Suckow, David Lubell, and Jonathan Lubell having expired, they have been discharged from the Army without further reserve obligations, with character of

ARGUMENT

1. It is well established that a complaint must be dismissed where indispensable parties have not been, and cannot be, joined. 3 Moore, *Federal Practice* (2d ed.), ¶ 19.07. A party is, of course, indispensable if a decree granting the relief sought would be ineffective in his absence. *Blackmar* v. *Guerre*, 342 U. S. 512; *Burns* v. *McCrary*, 229 F. 2d. 286 (C. A. 2); *Reeber* v. *Rossell*, 200 F. 2d 334 (C. A. 2). It is for this reason that petitioners' action is fatally defective at the outset, for they have brought suit against the wrong defendant in the wrong court. A brief review of the pertinent regulations reveals that a decree against respondent would not afford petitioners effective relief.

The sole defendant in this case is the Commanding General of the First Army. It is true that Fort Dix, where petitioners are stationed and where the Field Board of Inquiry was convened, is within the First Army Command. But, though he is petitioners' major commander, respondent does not have the authority to prevent the issuance of discharges pursuant to AR 604–10. Section V of that regulation prescribes the procedures for disposition of security cases. After receiving recommendations from a Department of the Army Security Screening Board, The Adjutant General forwards through the appropriate

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discharge and legal authority for discharge undetermined. In view of the order of the Court of Appeals and the fact that the mandate of that court has not yet issued, The Adjutant General has refrained from directing the issuance of any discharges pursuant to AR 604–10.

field commander a letter of allegations to the individual concerned. At the individual's request, a Field Board of Inquiry is convened by the commander exercising general court-martial jurisdiction, here the Commanding General at Fort Dix (not the respondent). The findings and recommendations of this Board, together with the recommendations of the appointing authority and the major commander, are forwarded to The Adjutant General, who refers the case to the Department of the Army Security Review Board in the District of Columbia for final review and recommendation. Action following final review is governed by Paragraph 35c of the Regulations: "If retention of the member is not warranted under the standards and criteria prescribed by these regulations The Adjutant General will direct the discharge of the member from any and all military statuses he may hold, including type of discharge to be furnished."

The Commanding General of the First Army is obviously powerless to prevent this action from being taken in any case which these superior officers consider appropriate. Recognition of this fact was the basis of the decision of the Court of Appeals. It would seem that suit should properly have been brought against the Secretary of the Army, The Adjutant General, or members of the Army Security Review Board, all of whom are subject to suit only in the District of Columbia. Cf. *Blackmar* v. *Guerre*, 342 U. S. 512. And cf. p. 7, *infra*.

Petitioners' reliance on the decisions of this Court in *Williams* v. *Fanning*, 332 U. S. 490, and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, as supporting their

contrary position (Pet. 16–18), is misplaced. Those cases hold that the superior government officer is not an indispensable party if a decree effectively granting the relief desired will not require him to take action, but will expend itself on the subordinate official who is before the court. In such circumstances it is immaterial that the subordinate is left under the command of his superior to do what the court has forbidden. Here, however, the respondent, the Commanding General of the First Army, stationed in New York, is not an appropriate subordinate on whom a decree granting relief will expend itself. He does not issue discharges. This is the function of officers at the Personnel Center at Fort Dix, in New Jersey. Those officers, conceding *arguendo* that they are the counterparts of the local postmaster in *Williams* v. *Fanning*, *supra*, are not within the jurisdiction of the District Court for the Southern District of New York. It is immaterial that they are under the respondent's command, for he is simply an intermediate commander between them and the superior officers in the Department of the Army (in the District of Columbia) who direct the issuance of discharges. A decree against respondent would result in the personnel officers receiving conflicting orders from their superiors, rather than in being subject to orders which conflict with a judicial decree directed *against them*.

Thus, however viewed, it is clear that the complaint was properly dismissed for failure to join indispensable parties against whom a decree granting the relief sought would be effective.

2. It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. Petitioners here do not dispute the fact that they have failed to exhaust the administrative remedies available to them. Maintenance of the exhaustion doctrine is important no matter what type of discharge petitioners ultimately receive. Indeed, this case, in which none of the petitioners had received any type of discharge when the action was brought (cf. fn. 4, *supra*), itself furnished strong support for the doctrine by way of example, in that petitioners Lessuck and Thomas were honorably released from active duty and transferred to the Army Reserve at the end of their terms of service. Thus, they had joined in this action, before the administrative hearings had even begun, to prevent an anticipated injury which never materialized.[5] As noted by the Court of Appeals in *Schustack* v. *Herren*, 234 F. 2d 134 (C. A. 2) (Pet. App. B), under the policy of the Depart-

[5] The significant fact that petitioners brought suit only in anticipation of possible legal injury serves to distinguish *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9), which they invoke as authority for by-passing their administrative remedies (Pet. 19). In that case, as the court emphasized (see 227 F. 2d at 713, 714–715), the plaintiffs complained of a present and continuing deprivation of employment as seamen based upon adverse security determinations. The court found these damages irreparable, warranting the immediate intervention of a court of equity. Without considering whether the doctrine of exhaustion should nevertheless have been applied there, it is clear that no similar consideration can justify ignoring it here. Also, in *Parker* v. *Lester* the Ninth Circuit held that the

ment of the Army now in effect, it is by no means certain in any case that proceedings under AR 604–10 need necessarily result in the issuance of a less-than-honorable discharge, even where unfavorable determinations are made.[6]

Furthermore, even if less-than-honorable discharges were issued to petitioners, they would have available to them the post-discharge system of administrative review which Congress has provided. Cf. *Gusik* v. *Schilder*, 340 U. S. 128. Under 38 U. S. C. 693 (h), petitioners could appeal to the Army Discharge Review Board, which has the authority to change, correct, or modify any discharge and issue a new discharge in accordance with the evidence presented to it by the aggrieved party. And, under 5 U. S. C. 191a, the Board for the Correction of Military Records, composed of civilian officers and employees, can correct any military record where that is found necessary to remove an injustice. The fact that these boards cannot entertain constitutional questions does not excuse failure to exhaust administrative remedies. Contrary to the assertion by petitioners (Pet. 19), there

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particular Coast Guard regulations there involved would not permit a fair hearing and could therefor be disregarded. The same cannot be said here. Cf. *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C. A. D. C.), certiorari denied, 351 U. S. 927.

[6] This current policy was set forth in D. A. Message 402295, dated March 26, 1956, quoted at length in the Court of Appeals' opinion in the *Schustack* case (Pet. 31–32), and now incorporated as a change to the Regulation. Character of service rendered, as well as the substantial derogatory information, is to be considered in determining the character of separation.

are factual issues which the administrative procedure might determine. Paragraph 13b of AR 604–10 provides: "The ultimate determination of whether acceptance or retention within the Army Establishment of the person concerned is warranted must be an overall common-sense one based upon all available information." This is a question of fact subject to review by the post-discharge administrative boards. Cf. *Bolger* v. *Marshall,* 193 F. 2d 37 (C. A. D. C.). Petitioners' constitutional and statutory challenge to the Regulation is clearly premature and does not mean that exhaustion may be dispensed with. *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, 553; *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552, 555–557 (C. A. D. C.), certiorari denied, 351 U. S. 927; see fn. 5, *supra,* p. 8.

3. While it is unnecessary, for the reasons already stated, to reach this further point, we note finally that the complaint was properly dismissed by the District Court for lack of jurisdiction to review the type and nature of discharge certificates issued by the armed services. Cf. *United States ex rel. Creary* v. *Weeks,* 259 U. S. 336, 343–344; *Reaves* v. *Ainsworth,* 219 U. S. 296, 304, 306. The Secretary of the Army has been authorized by Congress to prescribe regulations relating to Army discharges. 10 U. S. C. 652a. While this Court has not specifically ruled on the question (see *Patterson* v. *Lamb,* 329 U. S. 539, 542), the lower courts have been in agreement that the Army's action in fixing the type of discharge certificate to be issued is not subject to judicial review. *Gentila* v. *Pace,* 193 F. 2d 924 (C. A. D. C.); *Davis* v.

Woodring, 111 F. 2d 523 (C. A. D. C.); *Harmon* v. *Brucker,* 137 F. Supp. 475 (D. D. C.); *Nordmann* v. *Woodring,* 28 F. Supp. 573 (W. D. Okla.). In the *Harmon* case, Judge Youngdahl stated that "* * * under the present state of the law we lack requisite authority to review, control or compel the granting of particular types of discharge certificates" (137 F. Supp. at 477). And in the *Gentila* case, the court declared, "We think Congress intended that the Board's [Army Discharge Review Board's] full and 'final' review should not be subjected to a further review, or series of reviews, in the courts." 193 F. 2d at 927. The review system established by Congress within the military establishment furnishes the sole remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1956.

APPENDIX

38 U. S. C. 693h provides in pertinent part as follows:

> The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force, and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: * * * . Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to

review by the Secretary of the Army, the Secretary of the Air Force or the Secretary of the Navy, respectively * * *.

5 U. S. C. 191a provides in pertinent part as follows:

> The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * *.

10 U. S. C. 652a provides as follows:

> No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial.

U. S. GOVERNMENT PRINTING OFFICE : 1958

regulation C 2, which is attached.

*AR 604–10

ARMY REGULATIONS
No. 604–10

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *29 July 1955*

PERSONNEL SECURITY CLEARANCE

MILITARY PERSONNEL SECURITY PROGRAM

		Paragraph	Page
SECTION I.	GENERAL		
	Purpose and scope	1	2
	Definitions	2	2
	Policy	3	4
	Reporting information	4	4
	Utilization of investigative reports	5	5
	Control of investigative information	6	5
	Cooperation with investigative agencies	7	6
	Release of information prior to completion of action	8	6
	Effect of favorable determination	9	6
	Effect of indefinite assignment to specially controlled duties	10	6
	Command authentication	11	7
II.	STANDARD AND CRITERIA		
	Standard	12	7
	Criteria for application of standard	13	7
III.	ADMINISTRATIVE PROCEDURES		
	Loyalty certificate	14	10
	Application for appointment or enlistment	15	10
	Members of reserve components entering on active duty	16	11
	Registrants for induction	17	12
	Interview under oath	18	14
	Type of discharge	19	15
	Reduction upon undesirable discharge	20	15
	Notification to other agencies	21	16
	Entry on personnel records	22	16
IV.	INVESTIGATIVE PROCEDURES		
	Channels for reporting	23	16
	Scope of investigation	24	16
	Unfavorable investigative reports	25	16
	Action by local commander	26	17
	Action by major commander upon completion of investigation	27	17
	Action by the Assistant Chief of Staff, G–2, Department of the Army	28	19
V.	DISPOSITION OF CASES		
	General	29	20
	Department of the Army Screening Board	30	21
	Follow-up of Screening Board recommendations	31	21
	Field board of inquiry	32	23
	Department of the Army Review Board	33	26

*These regulations supersede SR 600–220–1, 18 June 1954, including C 1, 13 July 1954, and C 2, 10 November 1954; DA messages WAR 88979, 16 August 1950; 547450, September 1954; 560865, November 1954; 584963, 3 February 1955; and 596992, 21 March 1955.

		Paragraph	Page
SEC. V.	DISPOSITION OF CASES—Continued		
	Findings and recommendations	34	27
	Action following final review	35	27
VI.	SPECIAL PERSONNEL		
	Applicants for enrollment in ROTC	36	28
	Physicians and dentists denied commissions and subject to induction	37	29
APPENDIX			31

SECTION I

GENERAL

1. Purpose and scope. *a. Purpose.* These regulations prescribe the standard, criteria, and administrative procedures for the reporting, investigation, and disposition of military personnel in the Army Establishment; for the rejection of applicants for appointment or enlistment; and for the rejection of persons who would otherwise be inducted or involuntarily ordered into the Army when retention in or acceptance into the Army is inconsistent with the interests of national security. These regulations do not preclude trial by court-martial when such action is considered appropriate by commanders exercising court-martial jurisdiction. They do not preclude relief from active duty or discharge under other applicable regulations on grounds *other* than security. These regulations should not be used in those cases in which security is not the primary reason for initiation of action. Relief from active duty in lieu of action under these regulations is not authorized nor will action under these regulations be used as the *sole* basis for relief from active duty prior to the adjudication of a member's case.

b. Scope. These regulations apply to all military members of the Army Establishment including members of the National Guard of the United States on active duty and not on active duty and special categories of personnel covered in section VI. The Chief, National Guard Bureau will issue appropriate implementing instructions governing the National Guard of the United States not on active duty.

2. Definitions. For the purpose of these regulations, the following definitions apply:

a. National security. The term "national security" relates to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all acts designed to weaken or destroy the United States.

b. Military terms. The terms Army Establishment, Department of the Army, and major command are defined in AR 320–5.

c. Flagging action. The term "flagging action" is defined in AR 600–31.

d. Specially controlled duties. The term "specially controlled duties" refers to the type of assignment which a member occupies upon direction of the Department of the Army or while undergoing action to determine whether his retention is warranted under the standards and criteria prescribed by these regulations. A member may be temporarily assigned to such duties pending completion of action in his case for any reason that falls within the scope of the criteria defined in paragraph 13 regardless of whether flagging action under paragraph 26 has been initiated. Indefinite assignment to specially controlled duties upon direction of the Department of the Army is applicable only to enlisted personnel who have a reserve or service obligation under the Universal Military Training and Service Act. The term "specially controlled duties" means prohibition against assignment to or retention in any of the following duties or organizations:

(1) Officer candidate schools, as candidates or members of the staff.

(2) Duties in connection with mutual defense assistance program (MDAP) activities overseas.

(3) Duties in connection with classified cryptographic systems or equipment.

(4) Duties in connection with information, education, and orientation of troops, or the educational reconditioning of troops, including training for such duties.

(5) Duties in connection with classified research and development projects.

(6) Duties affording access to information or equipment classified as CONFIDENTIAL, SECRET, or TOP SECRET.

(7) Such other duties as the commander concerned may designate as sensitive.

e. Credible derogatory information. Credible derogatory information means information received from any source, which evaluated in the light of all other available information, both favorable and unfavorable, indicates that retention within the Army Establishment of the member concerned may not be, or is not, warranted under the standards and criteria prescribed by these regulations. Examples of information which may be used as a basis for flagging action are contained in paragraph 13.

f. Known communist. A known communist is any person who claims to be a current member of the Communist Party and/or any person against whom credible derogatory information exists establishing such current membership.

g. Short period of active duty for training. A short period of active duty for training is defined as a period of 90 days or less.

h. Completion of action. Completion of action under these regulations is as defined in AR 600–31.

i. Qualification of DD Form 98. The term "qualification of DD Form 98" means the acknowledgment of standards of conduct or of membership in or association with organizations listed thereon.

j. Refusal to accomplish DD Form 98 in its entirety. The term "refusal to accomplish DD Form 98 in its entirety" means the refusal to complete the form or the claiming of the Fifth Amendment or Article 31, Uniform Code of Military Justice, thereon.

3. Policy. *a.* The Department of the Army will assume, in the absence of evidence to the contrary, that the acceptance or retention of any officer, warrant officer, or enlisted man is clearly consistent with the interests of national security.

b. When it is established that retention of a member is *not clearly consistent* with the interests of national security, he will be discharged; except that an inductee normally will not be discharged as a security risk unless his retention is *inconsistent* with the interests of national security. (The standard for retention in service of an inductee is of necessity somewhat lower than the standard for other categories of personnel. Thus an inductee may be retained to perform his obligated service in a specially controlled duty under conditions which would require discharge of an officer or an enlistee. Also see par. 17*b*). In deciding upon the characterization of discharge in such cases, any doubt will be resolved in favor of the member and he will be discharged under honorable conditions. He will, unless otherwise prescribed in these regulations, be discharged with a discharge characterized no higher than "General, under Honorable Conditions."

c. Members who are indefinitely assigned to specially controlled duties upon direction of the Department of the Army and who have a Reserve obligation will be transferred to the Army Reserve to complete such obligation. They will be retained on specially controlled duties in the Reserve and "flagging action" will be maintained in accordance with AR 600–31.

d. In no case will any person, reasonably believed to have at any time engaged in any of the activities listed in paragraph 13 be appointed, enlisted, or called to active duty or active duty for training in the Army Establishment without the prior approval of the Secretary of the Army.

4. Reporting information. *a.* It is the duty of every member of the Army Establishment to report to his commanding officer any information coming to his attention which indicates that retention of

any member of the military service is not clearly consistent with the interests of national security. Examples of information which may provide a basis for reporting are contained in paragraph 13. Reports concerning members of the Army Reserve not on active duty will be referred to the commanding general of the major command in whose area the individual resides. Reports concerning members of the National Guard of the United States not on active duty will be referred to the Chief, National Guard Bureau, Department of the Army, Washington 25, D. C.

b. Whenever information comes to the attention of a commander which raises a question as to the security status of a member, the procedures described in paragraph 26 apply.

c. If any doubt exists as to the physical location of the member, the major commander possessing the information will ascertain the location of the member from The Adjutant General by the most expeditious means available and notify the major commander concerned.

5. Utilization of investigative reports. Investigations by agencies of the Army Establishment will develop all relevant facts in favor of, as well as against, an investigated person, with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described. Whenever possible, information will be so presented that its disclosure is not precluded in the interests of national security. In this connection the provisions of paragraph 45*f*, SR 380–320–10 apply. However, for those informants whose identities are not disclosed, sufficient information will be reported to permit adequate evaluation of the information furnished by them.

6. Control of investigative information. Reports and other investigative material and information developed by investigations conducted pursuant to regulations in implementation of the Army security program will remain the property of the investigative agencies conducting the investigation. Such reports and other investigative material and information will be maintained in confidence, and no access will be given thereto to other departments and agencies conducting security programs except under procedures prescribed by the Secretary of the Army. The release of information derived from Federal Bureau of Investigation or military sources pertaining to investigations of National Guard personnel is governed by procedures established by the Assistant Chief of Staff, G–2, Department of the Army, the Federal Bureau of Investigation, and the Chief, National Guard Bureau. Such information will not be furnished to any State adjutant general or other National Guard personnel not on active Federal service.

7. Cooperation with investigative agencies. Army investigative agencies will cooperate fully with other Federal investigative agencies, and will avoid action tending to prematurely warn suspects that they are under suspicion or to compromise confidential sources of information. In cases presenting any substantial reason for belief that retention within the Army Establishment may facilitate investigation and/or prosecution by Federal agencies, such retention not inconsistent with paragraph 19*c* may be effected notwithstanding any other provision of these regulations. Similarly, administrative procedures with a view toward separation, as directed herein, may be withheld for a reasonable period pending completion of necessary investigation and advice by the investigative agency concerned that its mission will not be hampered by institution of such procedures.

8. Release of information prior to completion of action. No notification of the nature, sources, or the existence of any counterintelligence information will be made to a suspected member or to other persons not normally entitled to such information except as provided for by paragraph 43, SR 380–320–10.

9. Effect of favorable determination. *a.* If proceedings hereunder or court-martial results in a favorable determination that retention of the member concerned on a regular duty status is warranted, such a determination will be conclusive and binding, and will in the absence of subsequently developed derogatory information support assignment of the member to any duty for which otherwise qualified to include the granting of a security clearance, if appropriate.

b. In those cases in which a final favorable determination has been made, the DD Form 98 (Loyalty Certificate For Personnel of the Armed Forces), DD Form 390 (Initial Data For Classification and Commissioning in Medical Services For Medical, Dental, and Veterinary Corps), or DD Form 398 (Statement of Personal History), if qualified, will be filed with the Central Records Facility File, and the individual will be instructed to execute new forms as appropriate with the following entry in the Remarks section: "Paragraph 9, AR 604–10 applies." This entry will be authenticated by the signature and the typed name of the officer responsible for the maintenance of the individual's military field 201 file, and will indicate the date that the entry was made and the authority by which the case was favorably closed.

10. Effect of indefinite assignment to specially controlled duties. If proceedings hereunder result in a determination that the member concerned is to be retained on indefinite assignment to specially controlled duty, such a determination will be conclusive and binding unless changed by the Department of the Army. The pro-

visions of AR 600–31 will apply with respect to taking of favorable personnel actions.

11. Command authentication. All requests for action or recommendations submitted under these regulations emanating below major command headquarters level will be forwarded over the personal signature of the commander concerned.

Section II

STANDARD AND CRITERIA

12. Standard. The standard for appointment, enlistment, voluntary call to active duty, or retention in a regular duty status within the Army Establishment will be that, based upon all the available information, it is determined that the appointment, enlistment, voluntary call to active duty, or retention in a regular duty status (par. 9) is *clearly consistent* with the interests of national security. The standard for retention within the Army Establishment on indefinite assignment to specially controlled duties (par. 10) for inductees only will be that retention in such an assignment is *not inconsistent* with the interests of national security.

13. Criteria for application of standard. *a. Sensitive and nonsensitive positions.* An officer or warrant officer of the Army holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities of his assignment. (This provision does not constitute authority for initiation of action to obtain a security clearance under SR 380–160–1.) Nothing herein will preclude the use of assignment to specially controlled duties as a security measure; however, indefinite assignment to such duty in lieu of action under these regulations is not authorized. Upon receipt of a completed investigation, commanders must initiate the action prescribed in paragraph 27 on persons temporarily assigned to specially controlled duties for security reasons.

b. Criteria. The ultimate determination of whether acceptance or retention within the Army Establishment of the person concerned is warranted must be an overall common-sense one based upon all available information. The activities and associations listed below, whether current or past, while not all inclusive, are of varying degrees of seriousness, and warrant initiation of action to effect such determination.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of the Government of the United States by unconstitutional means.

(3) Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of the Government of the United States by unconstitutional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means (see SR 600–220–11). (An organization, movement, or group, officially designated by The Attorney General of the United States pursuant to Executive Order 10450, shall be presumed to be subversive until the contrary has been established.)

(5) Performing or attempting to perform his duties, or otherwise acting, to serve the interests of another government in preference to the interests of the United States.

(6) Failure or refusal to sign the loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of the Uniform code of Military Justice, Article 31, in refusing to answer completely the questions contained in DD Form 98, DD Form 390, DD Form 398, or other related forms; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described above and below.

(7) Participation in the activities of an organization as a front for an organization referred to in (4) above, when his per-

sonal views were sympathetic to the subversive purpose of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

(9) Participation in the activities of an organization referred to in (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic association with a member or members of any organization referred to in (4) above. (Ordinarily, this will not include chance or occasional meetings, or contacts limited to normal business or official relations.)

(11) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to above. A close continuing association may be considered to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with, such persons.

(12) Close continuing association of the type described in (11) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(13) Any facts other than as set forth in *c* below which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

c. Relief from active duty or discharge under other appropriate directives or regulations. Persons whose conduct and association fall within the criteria prescribed in (1) through (5) below are examples of members whose retention may not be warranted under the standards and criteria prescribed by these regulations. However, action will not be initiated to discharge such persons under these regulations unless the criteria set forth in *b* above are also substantially involved, ~~or~~ action under other directives or regulations or the Uniform Code of Military Justice has been determined to be inappropriate.

(1) Willful violation or disregard of security regulations.

(2) Intentional unauthorized disclosure to any person of classified information, or of other information disclosure of which is prohibited by law.

(3) Any deliberate misrepresentation, falsification, or omission of material fact.

(4) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(5) All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy.

d. Proscribed organizations. A list of organizations designated by The Attorney General is set forth in SR 600–220–11. Membership, past or present, or affiliation or sympathetic association with an organization so designated is but one factor to be considered in making a determinatoin in a particular case. In determining whether affiliation with a cited organization warrants further investigation, all facts bearing on the case must be considered including the date, term, and extent of affiliation, the age and circumstances of the individual at the time, the type of organization and its status at the time in question, and the military service and overall performance of duty of the individual concerned. Careful consideration of all these factors, particularly in the absence of any other derogatory information, may indicate that the initiation of a complaint type investigation is not warranted.

Section III

ADMINISTRATIVE PROCEDURES

14. Loyalty certificate. All members or prospective members of the Army Establishment are required to accomplish a loyalty certificate (DD Form 98) as follows:

a. Each applicant for appointment or enlistment *prior* to his appointment or enlistment.

b. Each member of a reserve component or retired member voluntarily entering on active duty *prior* to such entry into active service except for short periods of active duty for training.

c. Each member of a reserve component or retired member involuntarily entering on active duty immediately upon reporting to his first duty assignment except for short periods of active duty for training.

d. Each registrant entering into active military service *prior* to induction.

15. Application for appointment or enlistment. Every applicant for appointment or enlistment in any component of the Army

Establishment will be required to read and/or have explained to him the criteria set forth in paragraph 13 of these regulations. In completing the DD Form 98, he will indicate in the remarks section thereof the extent of his participation, if any, in such activities or associations. This is in addition to the completion, where applicable, of a DD Form 398, and a DD Form 390.

a. If the applicant answers DD Form 98 in the negative, the form will be placed in his field military 201 file.

b. If the applicant completes DD Form 98 with qualifications or entries are made thereon which provide reason for belief that his appointment or enlistment is not clearly consistent with the interests of national security, such appointment or enlistment will be held in abeyance. The DD Form 98, together with the DD Form 398 or DD Form 390 will be forwarded through intelligence channels to the Assistant Chief of Staff, G–2, Department of the Army, Washington 25, D. C., ATTN: Chief, Security Division. The applicant will not be appointed or enlisted without specific approval of the Secretary of the Army.

c. If the applicant refuses to accomplish DD Form 98 in its entirety, his appointment or enlistment will be denied. The following data will be entered in the space provided for Remarks:

Name.
Date of birth.
Place of birth.
Home address.
The above named individual refused to sign LOYALTY CERTIFICATE _____
(Date)

The loyalty certificate will be forwarded to the Assistant Chief of Staff, G–2, Department of the Army, Washington 25, D. C., ATTN: Chief, Security Division, for appropriate disposition.

d. No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615–120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

16. Members of reserve components entering on active duty. Every member of a reserve component of the Army who voluntarily enters on active duty, except for short periods of active duty for training, will be required to complete DD Form 98 prior to entry on

active duty and to read paragraph 13 of these regulations and indicate in the remarks section of the DD Form 98 the extent of his participation, if any, in such activities or associations. Every member of a reserve component of the Army who is involuntarily called or ordered to active duty, except for short periods of active duty for training, will be required to complete DD Form 98 immediately upon reporting to his first duty assignment and to read paragraph 13 of these regulations and indicate in the remarks section of the DD Form 98 the extent of his participation, if any, in such activities or associations. If the member refuses to accomplish DD Form 98 in its entirety or makes entries thereon which provide reason for belief that his entry or retention is not clearly consistent with the interests of national security the following action will be taken:

a. Voluntary entry. The member's entry on active duty will be held in abeyance. The provisions of paragraph 18 apply prior to initiation of action under section IV of these regulations. AR 600–31 applies. The individual will not be ordered or called to active duty without specific approval of the Secretary of the Army.

b. Involuntary entry. The provisions of paragraph 18 apply prior to initiation of action under section IV of these regulations.

17. Registrants for induction. *a.* ~~Known communists will NOT~~ be inducted into the Army Establishment. Upon the prospective inductee's own admission that he is a member of the Communist Party or upon receipt of credible derogatory information establishing such membership, his induction will be held in abeyance. A cable report will be transmitted to the Assistant Chief of Staff, G–2, Department of the Army, Washington 25, D. C., ATTN: Chief, Security Division, with an information copy to the G–2 of the major command, stating the name, date and place of birth, address of registrant and a statement of the source of information and the circumstances of the case. Classification will be in accordance with AR 380–5. Paragraph 43, SR 380–320–10, applies. Induction of the registrant will not be made without prior approval of the Department of the Army. Necessary investigation will be initiated as provided in *b* below.

b. A registrant who refuses to accomplish the DD Form 98 in its entirety or who discloses significant derogatory information with respect to his background will be accepted into the service and, pending completion of a thorough investigation, will be retained on specially controlled duties in the lowest enlisted pay grade permitted by law except that if prior to induction investigation discloses significant information to indicate that induction and retention within the military service would be inconsistent with the interests of ~~national security, such induction will be held in abeyance and the pro-~~

visions of *a* above, apply. When a registrant qualifies his DD Form 98 the commanding officer of the induction station will forward a letter report, subject: "Qualification of DD Form 98," to the major command, ATTN: G–2. The letter will include the name, the date and place of birth, the civilian address of the person, and his grade and service number, if known. The DD Form 398 and fingerprint card, properly completed, will be forwarded as inclosures to the letter report. The major command upon receipt of the above information is responsible for the initiation of the required investigation subject to prior coordination with the Federal Bureau of Investigation under the provisions of SR 380–320–1 and SR 380–320–2 regardless of the location of the training station to which the inductee is assigned. Flagging action under AR 600–31 will not be a bar to the transfer of the inductee from the induction station to the reception or training station. When a reception or training station receives a DD Form 47 (Record of Induction) of an inductee in which item 23a has been amended by the words "DD Form 98 No," the major command controlling the investigation will be informed of the present assignment of the member. (Normally, this is the G–2 of the same major command from which the member entered the military service.) The major command functioning as control office for the investigation, upon receipt of notification of the assignment of the member concerned, is responsible for furnishing the major command in whose area the training station is located a copy of the DA Form 268 (Report for Suspension of Favorable Personnel Actions) which established the flagging action. The member concerned will not be reassigned outside the major command in whose area the training station is located except with the prior approval of the Department of the Army. The results of the completed investigation will be forwarded to the major commander in whose area the member is assigned. Unless the case is closed favorably, it will be forwarded to the Department of the Army for appropriate action as follows:

(1) In the case of an inductee who refused to accomplish DD Form 98 in its entirety—

(*a*) If retention is inconsistent with the interests of national security, he will be discharged with an undesirable discharge (secs. IV and V).

(*b*) If there is insufficient derogatory information to require his discharge in the interests of national security, he will be retained in the Army with indefinite assignment to specially controlled duties and, upon completion of his service, will be discharged or released from active duty with a

separation document characterized no higher than "General, under Honorable Conditions" (secs. IV and V).

(2) In the case of an inductee who disclosed significant derogatory information on his DD Form 98—

(*a*) If retention is inconsistent with the interests of national security but investigation fails to reveal significant derogatory information not previously disclosed by the inductee, he will be discharged with a discharge characterized no higher than "General, under Honorable Conditions" (secs. IV and V).

(*b*) If there is insufficient derogatory information to require discharge in the interests of national security, the inductee will be appropriately assigned. If retained on regular duty, type of discharge or relief from active duty will be predicated upon the character of the service performed. If retained on specially controlled duty as a result of derogatory information over which the inductee had no control, the type of discharge or relief from active duty will be predicated upon the character of service performed (secs. IV and V). In all other cases of retention on specially controlled duty, discharge or relief from active duty upon completion of the service performed will be characterized no higher than "General, under Honorable Conditions."

18. Interview under oath. Before the qualification of or refusal to accomplish DD Form 98 is used as a basis for the initiation of a complaint type investigation, the individual will be given a thorough explanation of the reason why his execution or nonexecution of the form is considered open to question. He will be interviewed under oath by a competent interrogator in order that he may make as complete a statement as he desires and furnish any information which may be useful in making a determination in his case. He will be advised also of the effect of applicable regulations upon his status in the Army in the event that his case is processed under these regulations. Approval by the Assistant Chief of Staff, G–2, Department of the Army, to conduct this interview under oath is not required. In those cases where the individual has not claimed Federal Constitutional Privilege or refused to sign the DD Form 98 but has cooperated in furnishing information which in itself is not sufficient to warrant an unfavorable recommendation under these regulations, any investigation predicated thereon will be classified as a personnel security investigation. In such cases, the provisions of paragraph (27*c*) (1) and (2) will apply until such time as the investigation may develop suffi-

cient credible derogatory information which warrants its classification as a complaint type investigation. Upon completion of the investigation, the case will be forwarded as required by paragraph (27c) (3).

19. Type of discharge. *a.* Where the approved findings of the Army Review Board indicate that a member of the Army Establishment should not be retained under the standards and criteria prescribed in these regulations he will be discharged and the character of the discharge will, except as prescribed in paragraph 17, be predicated upon the gravity of the reasonably substantiated information in derogation. The general premise with respect to characterization of separation as set forth in paragraph 17*b* is applicable to all categories of personnel (par. 3*b*). Regular Army officers with over 3 years' service as such will be furnished a discharge authorized by section 106, Army and Air Force Vitalization and Retirement Act of 1948 (61 Stat. 1082; 10 U. S. C. 585).

b. The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: "AR 604–10 SPN 82." The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: "AR 604–10 applies." Members relieved from active duty or discharged prior to completion of an action under these regulations will have "Paragraphs 9 and 20 (as appropriate), AR 615–120 applies" entered in item 38, DD Form 214.

c. Separation or discharge orders issued under these regulations will be in Letter Order form. Members whose cases are being processed under the provisions of these regulations will not be relieved from active duty or discharged for any reason prior to receipt of directive from the Department of the Army. In order to preclude the retention of members beyond the expiration of their category or term of service, which is not authorized except under the conditions set forth in MCM 1951, paragraph 11*d*, major commanders are required to request instructions from The Adjutant General, Department of the Army, Washington 25, D. C., ATTN: AGPO, 60 days prior to the date of expiration of category or term of service of any member on whom a DA Form 268 has been initiated in accordance with section II, AR 600–31. Request will contain synopsis of allegations against the member, the status of the case or investigation with expected date of completion and forwarding to the Department of the Army, and any other information deemed pertinent.

20. Reduction upon undesirable discharge. Upon determination that an enlisted member is to be discharged from the service with an Undesirable Discharge under the provisions of these regulations, the

authority accomplishing the discharge will, if the member concerned is in grade above E–1, automatically reduce such member to grade E–1 without further administrative procedure by discharging the enlisted member in that grade.

21. Notification to other agencies. In accordance with SR 615–180–1 the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the appropriate local Selective Service Board will be furnished information of the identity of all persons rejected for induction for security reasons. The Assistant Chief of Staff, G–2, Department of the Army, will inform the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the Director, Selective Service System, of all persons denied appointment or enlistment or discharged from the military service as security risks.

22. Entry on personnel records. Except as indicated in paragraph 9*b*, no entry will be made on any military field personnel records which indicates final determination of a case adjudicated under the provisions of these regulations.

Section IV

INVESTIGATIVE PROCEDURES

23. Channels for reporting. A commander or the Chief, National Guard Bureau, receiving a report within the scope of paragraph 4 will refer the report, through intelligence channels, to the major commander concerned, ATTN: Assistant Chief of Staff, G–2. The major commander will cause such investigation to be made as is necessary to support fully the allegation or suspicion or disprove it and, if supported, to provide sufficient information upon which action may be initiated under these regulations.

24. Scope of investigation. Investigations initiated under these regulations will be conducted in accordance with SR 380–320–10 by the appropriate investigative staff of the Army Establishment. A summary of information is not considered sufficient for the purposes of these regulations since the administrative procedures described herein are directed to the end of obtaining factual findings that the member under investigation is, or is not, a person whose continued service is clearly consistent with the interests of national security.

25. Unfavorable investigative reports. Whenever a report of investigation is received which contains derogatory information, or whenever credible derogatory information within the scope of these regulations is received from any source, a positive determination as to whether or not retention of the member concerned is warranted

under the standards and criteria prescribed by these regulations is required. If it is determined that retention is not warranted, the following rules will apply:

a. When the derogatory information falls wholly within the criteria of paragraph 13*c*, action to effect relief from active duty or discharge, if appropriate, normally will be taken under other administrative regulations, or through court-martial proceedings.

b. When the derogatory information falls within the criteria of paragraph 13*b*, or a combination of paragraph 13*b* and *c*, action will be taken to effect discharge under these regulations, or through court-martial proceedings.

26. Action by local commander. Upon receipt of derogatory information within the scope of paragraph 13, action will be taken as follows:

a. If the information available is sufficient for a positive recommendation that retention of the member concerned is warranted under the standards and criteria prescribed by these regulations, the commander will forward the case through channels to the major commander concerned with a statement of reasons for the recommendation. During the interim, the member may be retained in his present duty assignment.

b. If the information available is not sufficient for a positive recommendation, the commander will request the major commander concerned for additional investigation.

c. Pending completion of any requested investigation, and prior to a final determination in the case, the commanding officer will take such action as is necessary to protect the security of his command. For those cases that fall within the criteria of paragraph 13*b*, or a combination of paragraph 13*b* and *c*, action will include temporary assignment to specially controlled duties, revocation of the security clearance, if any, and denial of access to classified information pending completion of action on the case. In addition, pending the issuance of DA Form 268 by the major commander the commanding officer will initiate the action described in AR 600–31 to insure that the personnel actions described in paragraph 1, AR 600–31, are not accomplished without the prior approval of the Department of the Army. Requests for removal of suspension of favorable personnel actions in cases involving the national security will be submitted through the major commander to the Department of the Army in writing or by teletype.

27. Action by major commander upon completion of investigation. A positive recommendation in the light of the criteria of paragraph 13 is required in each case indicating whether or not, based

upon all the information available, retention of the member concerned is or is not warranted under the standards and criteria prescribed by these regulations. The following rules will apply:

a. When the information available, e. g., receipt of Federal Bureau of Investigation reports, reports of investigation from Department of the Army or other departments, or credible derogatory information from any source is of sufficient stature to support a positive recommendation that retention is not warranted, the major command will forward the case, with DD Form 98 (and DD Form 398, if appropriate), to the Department of the Army, ATTN: Assistant Chief of Staff, ~~G–2~~ (Chief, Security Division), without prior referral to the subordinate command. The major commander is responsible for the actions and reports described in paragraph 26*c*. The subordinate commander will be informed of the action taken. The recommendations will include one of the following as appropriate:

(1) Discharge in the interests of national security and the type of discharge.

(2) Retention on indefinite assignment to specially controlled duties with or without change of station (applicable only to enlisted personnel ~~having~~ a reserve or service obligation under Universal Military Training and Service Act).

b. Initiate further investigation and/or direct interview under oath, if appropriate, if insufficient information is available on which to base a determination or recommendation.

c. If a favorable determination is made, close the case favorably and—

(1) Remove flagging action under AR 600–31.

(2) Restore the member to duty as prescribed by paragraph 9.

(3) Forward the case file and the G–2 Central Records Facility copy of the report of investigation as required by *e* below, together with a copy of the letter to the subordinate commander setting forth the favorable determination.

d. Cases sent to the Department of the Army under *a* or *c* above will be forwarded to the Department of the Army, ATTN: Assistant Chief of Staff, G–2 (Chief, Security Division), with a detailed explanation of the reasons and basis for the commander's recommendation. The cover letter will also include the following:

(1) The name, grade, and service number of the member concerned.

(2) The date and place of birth of the member.

(3) The military address of the member and civilian address if not on active duty.

(4) The date that flagging action under AR 600–31 was initiated.

(5) Reasons for non-submission of DD Form 398, if applicable.

c. It is recognized that certain military personnel may be of alien nationality or origin and, accordingly, be considered a security risk by an oversea commander. It is also recognized that certain other military personnel assigned to oversea commands may be determined to constitute a security risk because of disloyalty or disaffection and consequently should not remain in any assignment in the oversea command concerned. If, after appropriate investigation in accordance with these regulations, a determination is made by the oversea commander that military personnel in his command constitute a security risk and it is desired that such personnel be returned to continental United States, authority for such action is hereby granted. In no case should this authority be used in lieu of disciplinary action, nor in lieu of discharge action, when appropriate, under the military security program. The orders of military personnel returned to continental United States under this authority will clearly refer to paragraph 27*c*, AR 604–10, as the authority for the action. ~~The letter of transmittal~~ will indicate what assignment, if any, is ~~considered~~ suitable for such personnel and whether, in the opinion of the oversea commander concerned, such personnel ~~should~~ be separated from the Army. In either case, two ~~copies of~~ the report of investigation and orders will be forwarded ~~to~~ the Assistant Chief of Staff, G–2, Department of the ~~Army, Washington 25, D. C., ATTN: Chief, Security Division~~.

28. Action by the Assistant Chief of Staff, G–2, Department of the Army. Whenever information is received from the Federal Bureau of Investigation or any other source which indicates that retention may not be warranted under the standards and criteria prescribed by these regulations, action will be as follows:

a. When the information is of sufficient stature to support removal—

(1) The case will be forwarded to The ~~Adjutant~~ General, Department of the Army, with appropriate recommendation and information on which to base a "Letter of Allegations."

(2) Action under paragraph 26*c* will be directed if not previously accomplished.

b. When the information is not of sufficient stature to warrant removal—

(1) Close the case favorably and restore the member to duty as prescribed by paragraph 9, or

(2) Forward the case to The ~~Adjutant~~ General, Department of the Army, with information on which to base a "Letter of Allegations" and with a recommendation that the member should be retained within the service and assigned to specially controlled duties, or

(3) Forward the case to the major command for processing under these regulations.

c. When the information is not of sufficient stature to support a positive recommendation as to removal or retention—

(1) Direct interview under oath.

(2) Issue an interrogatory.

(3) Direct further investigation.

d. Review all cases received under the provisions of paragraph 27*c*(3) and recommend specific action in cases in which the decision of the major commander is not considered appropriate.

Section V

DISPOSITION OF CASES

29. General. *a.* Upon receipt of a case with appropriate recommendation from the Assistant Chief of Staff, G–2, Department of the Army, The Adjutant General will—

(1) If a Regular Army commissioned officer with over 3 years' service as such, process the case under section IV, AR 605–200. The case will, however, be referred to the Army Screening Board for action in accordance with paragraph 30.

(2) Refer all other cases to a Department of the Army Screening Board for review and recommendations.

b. Major commanders will designate security advisors to provide guidance to field boards on security matters.

c. The Assistant Chief of Staff, G–2, Department of the Army, will make available a competent security advisor to provide guidance to the Army Screening Board and Army Review Board on security matters.

d. All members of all boards and panels referred to in these regulations must have been the subject of a background investigation under the provisions of SR 380–160–1 or an investigation of equal scope with favorable results. Pending receipt of a completed background investigation, however, military personnel may be assigned to such duties provided that a background investigation has been initiated, and TOP SECRET clearance has been granted based on a National Agency Check with favorable results plus continuous honorable active duty as a member of the Armed Forces or as a civilian in the Government service or a combination of both, for a minimum of 10 consecutive years immediately preceding the date of current investigation. Administrative personnel who are engaged in the processing of cases must have been granted at least a SECRET clearance under SR 380–160–1.

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30. Department of the Army Screening Board. A Screening Board composed of a minimum of three field grade officers operates at Department of the Army level. This Board will review all cases received from The Adjutant General, will determine what further action should be taken, and will, except for cases covered by paragraph 31*a*, return the case to The Adjutant General with a recommendation for such of the following actions as are appropriate:

a. Favorable closing of case.

b. Further investigation.

c. Initiation of action under MCM 1951, chapter VII, when it appears that there is sufficient evidence to warrant trial, and provided release of such evidence in open court has been authorized by the Assistant Chief of Staff, G–2, Department of the Army.

d. Initiation of elimination action under these regulations.

e. Discharge of member under other appropriate regulations.

f. Retention in the service of those enlisted personnel who have a Reserve or service obligation against whom insufficient information exists to warrant their removal in the interests of national security but against whom sufficient evidence exists to warrant their indefinite assignment to specially controlled duties.

g. In conjunction with recommendation for action specified under *d* above, a recommendation will be made with respect to the character of discharge to be awarded in the event the member tenders his resignation or requests discharge in lieu of elimination proceedings.

31. Follow-up of Screening Board recommendations. *a. Action to close case favorably.* If the Screening Board recommends that the case be closed favorably, it will forward the case to the Assistant Chief of Staff, G–1, Department of the Army, who will approve the recommendation or, if the recommendation is overruled, direct one of the actions indicated in paragraph 30.

b. Action to continue the case. When the Screening Board recommends action other than to close the case, The Adjutant General will notify the appropriate staff activity and/or field command of action desired. If elimination action or indefinite assignment to specially controlled duties is recommended under these regulations, The Adjutant General will initiate action as indicated in *c* below.

c. Letter of Allegations. Upon receipt of a Screening Board recommendation to initiate elimination action or to indefinitely assign the member to specially controlled duties, The Adjutant General, based on information furnished by the Assistant Chief of Staff, G–2, Department of the Army, will, in conjunction with the Judge Advocate General, prepare a "Letter of Allegations." The "Letter of Allegations" will cite the derogatory allegations against the respondent in

sufficient detail to enable him to prepare his defense and will be as complete as security considerations permit. The case together with the "Letter of Allegations" will be transmitted to the appropriate field command for dispatch of the letter to the respondent. Whenever practicable, the field commander will have the letter delivered in person to the respondent concerned and obtain a signed receipt therefor. If personal delivery is not practicable, delivery will be by registered mail and a return receipt "addressee only" will be required. The following additional procedure will apply with respect to members of the National Guard not on active duty: The "Letter of Allegations" will be forwarded direct to the respondent by the Chief, National Guard Bureau (par. 6 applies); the Chief, National Guard Bureau, will forward a copy of the "Letter of Allegations" to the major commander concerned citing the date of dispatch to the respondent; the respondent will acknowledge receipt of the "Letter of Allegations" to the major commander concerned and will make his reply to the major commander concerned; The Adjutant General will forward the case direct to the major commander concerned. The "Letter of Allegations" will refer specifically to these regulations and will inform the respondent that—

(1) He may, in lieu of appearance before a board, rebut the letter in writing within 15 days of receipt and submit such documents as he may desire. Reasonable extension of time may be granted by the field commander.

(2) He may, within 5 days of receipt, request retirement, if eligible, or if an officer, he may tender his resignation, or if an enlisted man, he may request discharge in lieu of further proceedings. Enlisted men who are required to show cause why they should not be retained on specially controlled duties will not be permitted to submit a request for discharge. A member tendering his resignation or requesting discharge must agree to accept discharge of the character specified in the "Letter of Allegations." Final decision as to type of discharge to be awarded rests with the Department of the Army. A form letter to accomplish the tender or request will accompany each "Letter of Allegations" dispatched.

(3) He may, within 5 days of receipt, request a personal appearance hearing before a "field board" with or without counsel, and if a reservist not on active duty, such appearance will be at his own expense. He will be furnished a military counsel and may select such counsel, if the individual selected is reasonably available. Civilian counsel, if desired, will be at his own expense. The Board will assist him in procuring witnesses who are reasonable available but he will not be

entitled to reimbursement for expenses incurred incident to their appearance.

(4) He will elect in writing one of the choices offered in (1), (2), or (3) above. Should he refuse to elect one of the choices offered, he will be advised that his case will be processed to completion and adjudicated by the Department of the Army without any further referral to him. He will be advised also that such adjudication may result in an other than Honorable, General, or Undesirable Discharge.

d. Follow-up of letter of allegations. Upon receipt of the respondent's reply to the "Letter of Allegations" or upon expiration of 15 days following receipt of the letter by the respondent, whichever is sooner, the appropriate field commander will take action to refer the case to a field board of inquiry (if requested by the respondent) or to forward the case together with respondent's reply, if any (where appearance before a board of inquiry is not requested), to The Adjutant General with recommendation of action to be taken. The Adjutant General will refer the complete case together with recommendations of appropriate field commanders to the Army Review Board for final review in accordance with paragraph 33.

32. Field board of inquiry. *a.* Authority to convene field boards of inquiry under these regulations is vested in commanders who have general courts-martial jurisdiction, except that boards convened to hear the case of a member of the National Guard not on active duty will be appointed by major commanders only. Upon request by the respondent for appearance before a board of inquiry under these regulations, the appropriate field commander will refer the case to such a board and will include all evidence in support of the allegations to include the respondent's reply and such other information as is cleared by the Assistant Chief of Staff, G–2, Department of the Army.

b. Field boards of inquiry convened under these regulations will be composed of field grade or general officers who are senior in both temporary and permanent rank to the respondent, and one or more recorders (officer, rank immaterial) without vote. Three or more officers will constitute the membership of each board of inquiry. If the respondent is a female, there will be added to the detail of the board of inquiry a female officer of the same corps who shall be an advisor without vote unless the respondent waives this provision. A board convened to hear the case of a member of a reserve component not on active duty will, in addition to the above, be constituted as required by paragraph 4, SR 140–15–1. A board convened to hear the case of a member of the National Guard not on active duty will include one National Guard officer on active duty. A board convened to hear the case of a member

of a reserve component on active duty or of a Regular Army warrant officer or enlisted man who holds a Reserve commission or warrant will include at least 1 reserve officer who shall participate in the actual hearing of the case. No hearing will be conducted with less than 3 board members present.

c. Field boards of inquiry convened under these regulations will be governed by the applicable provisions of AR 15–6 and SR 605–200–1 for both officers and enlisted men. The following special provisions apply:

(1) The board will be convened as soon as practicable. Reasonable time will be afforded the member to prepare his case; however, a period in excess of 15 days may be granted only in case of a showing of vital need.

(2) No officer will sit as a member of more than one such board in considering the case of any one respondent.

(3) No officer will sit as a member of such a board who is to be, or has been called as a witness, or who previously recommended, or has been a member of any board or court-martial which considered the respondent for disciplinary action or elimination.

(4) The board of inquiry may summon witnesses on its own motion and may rebut any evidence presented by the respondent appearing before it. The board of inquiry is not limited to evidence related to occurrences prior to the date of action by the convening authority. In order to insure maximum confrontation of adverse witnesses, the board is instructed to invite, as a matter of standard procedure, each nonconfidential witness who has been personally identified, who has given information adverse to the member, and who has not indicated expressly an unwillingness to appear. Geographic distances will be no bar to extending invitations, except that invitations need not be extended to witnesses in noncontiguous oversea areas. Such witnesses will be asked to appear at the hearing to testify in the member's presence and be subjected to cross-examination. They will be asked also whether they would submit a signed statement, permit their names to be disclosed as the source of the information given, and whether their statement previously given may be read to the member with or without the witness' name being disclosed. At the request of the president of the board, members of the Army on active duty who are desired as witnesses will be placed on temporary duty orders for the purpose of appearing as witnesses. To those witnesses who are not on active duty in

the Army, the invitation will state that the board cannot pay witness fees or reimbursement for travel or other expenses. A suggested invitation to qualified witnesses is contained in the appendix. Whenever a witness signifies a desire to appear before the board in private, the president of the board will arrange such a meeting, preferably before the hearing. The witness will be heard under oath and a verbatim CONFIDENTIAL transcript of his testimony will be made and added to the complete file. A copy of that transcript will not be supplied the member unless the witness agrees. If the witness agrees to release the transcript, it will be regraded unclassified and the witness' name will be deleted unless the witness permits it to be used. The witness' agreement should be included in the questions and answers in the transcript, usually at the end. Adverse witnesses who are members or employees of the Army Establishment should be urged to attend, and commanding officers should be requested to permit such employees to attend. Necessary time to attend a board of inquiry will be recorded as official duty and no charge made to leave.

(5) The findings will include a determination with respect to each of the allegations set forth in the "Letter of Allegations" and an analysis of information and a detailed statement of reasoning upon which each finding is based. During the course of the board proceedings, the line of questioning will be evolved to give the member all possible information forming the basis for the charges, but CONFIDENTIAL sources of information and other classified information are to be protected. Parts of written statements submitted by informants may be read verbatim to the member provided that the source of the information has authorized its release, or provided that the reading would not disclose the source. This restriction similarly applies to expressions or statements attributed to the member by an informant. In all other cases information disclosed to the member should be phrased in such a manner as to insure that the sources of the information are not compromised.

(6) The Board's findings and recommendations will be signed by all concurring members. Dissenting opinions, where applicable, will be submitted.

(7) The Board will recommend one of the following:

(*a*) Retention on regular duty with or without change of station.

(*b*) Retention on indefinite assignment to specially controlled duties with or without change of station (applicable only to enlisted personnel ~~having~~ a reserve or service obligation under Universal Military Training and Service Act).

(*c*) Discharge in the interests of national security and the type of discharge.

(8) The Board will inform the respondent that—

(*a*) He or his counsel, upon request, will be furnished a copy of the transcript of the hearing; however, such transcript will not contain the Board's findings and recommendations. Such findings and recommendations will not be made public or divulged to the respondent or his counsel.

(*b*) Its recommendations in the case do not constitute final and conclusive action but are subject to review by the convening authority, and that the proceedings are forwarded to the Department of the Army for final review and decision.

(*c*) He may submit to The Adjutant General, Department of the Army, Washington 25, D. C., in writing within 10 days of receipt of "Field Board" transcript, any further evidence or information he may desire to have considered in a final review of his case by a Department of the Army Review Board, and that failure to receive additional information within 10 days of his receipt of the transcript plus normal mailing time will cause his case to be considered without further representation from or for him.

(*d*) The record of proceedings of the Board will indicate that the respondent has been informed of the above.

(9) Upon completion of its inquiry, the Board will forward the complete case through command channels to The Adjutant General. The commander who appointed the Board and the appropriate major commander will include their recommendations in the forwarding indorsement.

33. Department of the Army Review Board. *a.* Upon receipt of a case with recommendations of the field board of inquiry and appropriate field commanders together with additional comments, if any, from the respondent, or upon the expiration of 10 days plus normal mailing time to and from the respondent following his receipt of transcript of the "Field Board" actions, whichever is later, The Adjutant General will refer the case to the Army Review Board for final review and recommendation.

b. When the respondent is a member of a reserve component, the Review Board will include at least one officer of a reserve component.

c. No officer who has participated in the consideration of the case before a screening board will participate in the consideration of the same respondent's case before the Review Board.

d. The proceedings of the field board of inquiry, including all evidence submitted by it, any additional statements submitted by the respondent after the hearing by the field board of inquiry, and the recommendations of appropriate field commanders will be made available to the Review Board. The respondent will not appear in person before the Review Board unless the Board so requests. The Review Board may request additional information or further investigation, as appropriate.

e. The Review Board will direct one of the actions indicated in paragraph 32*c*(7), to include the type of discharge when appropriate, except that when the Review Board decision is to discharge a Reserve officer on active duty or a Regular Army officer with less than 3 years' service as such, the Board will submit the case to the Secretary of the Army for final approval.

f. The decisions of the Review Board, and where applicable, of the Secretary of the Army, will be transmitted to The Adjutant General for necessary action.

34. Findings and recommendations. Board members will take into consideration that the respondent may have been handicapped in his defense by the nondisclosure to him of classified information or by the lack of opportunity to cross-examine persons constituting sources of such information, and will evaluate information carefully in the light of its recency, relative seriousness, attendant circumstances, whether it was given under oath, whether it is relevant, whether the respondent has had an opportunity to rebut it, and whether there is similar or supporting information.

35. Action following final review. The Adjutant General will notify the appropriate field commander of final action to be taken. In cases concerning members of the National Guard not on active duty, the Chief, National Guard Bureau, will be informed of such action.

a. If it is determined that retention of the member is warranted under the standards and criteria prescribed in these regulations, The Adjutant General will close the case favorably as indicated in paragraph 9, and direct the major commander to notify the member in writing and to remove flagging action in accordance with AR 600–31. All information pertinent to the case will be removed from the field military 201 file of the individual concerned.

b. If it is determined that indefinite assignment to specially controlled duties is consistent with the interest of national security, The

Adjutant General will direct the major commander to notify the member in writing. Flagging action will be continued in accordance with AR 600–31.

c. If retention of the member is not warranted under the standards and criteria prescribed by these regulations The Adjutant General will direct the discharge of the member from any and all military statuses he may hold, including type of discharge to be furnished. Flagging action will be removed by the Department of the Army in accordance with AR 600–31.

Section VI

SPECIAL PERSONNEL

36. Applicants for enrollment in ROTC. *a. Loyalty certificates.* Every applicant for enrollment in the advanced courses, senior division, or Military Science and Tactics 5 and 6 courses, military schools division, in addition to the completion of a DD Form 98, will be required to read and/or have explained to him the criteria set forth in paragraph 13 of these regulations and to indicate in the remarks section of DD Form 98 the extent of his participation, if any, in the activities or associations covered by that paragraph. This requirement will be completed in sufficient time to permit adjudication of a case prior to the date of enrollment. The completion of DD Form 98 at the time of application for enrollment in ROTC does not exempt the applicant from the requirement for completion of a DD Form 98 at the time of application for commission.

(1) If the applicant answers DD Form 98 in the negative, the form will be retained by the Professor of Military Science and Tactics. Upon completion of training, this DD Form 98 will be incorporated as part of the appointment papers.

(2) If the applicant completes DD Form 98 with qualifications, or entries are made thereon which provide reason for belief that his enrollment is not clearly consistent with the interests of national security, such enrollment will be held in abeyance. The DD Form 98, together with three copies of DD Form 398 will be forwarded to the major command for action in accordance with *b* below.

(3) If the applicant refuses to accomplish DD Form 98 in its entirety, his enrollment will be denied. DD Form 98 will be completed in accordance with paragraph 15*c* and forwarded to the Commanding Officer, G2 Central Records Facility, Fort Holabird, Baltimore 19, Maryland.

b. Investigative procedures. Investigative procedures, so far as applicable, will be in accordance with section IV. For purposes of this

paragraph, the local commander referred to in section IV will be the Professor of Military Science and Tactics. Major commanders will cause appropriate investigation to be made subject to prior coordination with the Federal Bureau of Investigation under SR 380–320–1 and SR 380–320–2. Recommendations will be limited to approval or denial of enrollment. Major commanders and the Assistant Chief of Staff, G–2, Department of the Army, may direct further investigation if information is insufficient to make a recommendation.

c. Disposition of cases. Disposition of cases, so far as applicable, will be in accordance with section V. Letter of Allegations for the student will be appropriately modified and will inform him that should he elect appearance before a "Field Board" he may do so with or without counsel but that such counsel and any other expenses incident to his appearance will be at the student's expense. Boards of Inquiry will, if possible, be convened in the vicinity of the student's college residence.

(1) The Department of the Army Screening Board will recommend one of the following:
  (*a*) Further investigation.
  (*b*) Favorable closing of case.
  (*c*) Initiation of denial of enrollment action under these regulations.
(2) Field Boards of Inquiry will recommend and the Department of the Army Review Board will direct approval or denial of enrollment.
(3) Upon adjudication of a case The Adjutant General will notify the student and the major command of the decision.

37. Physicians and dentists denied commissions and subject to induction. *a.* The case of a physician or dentist who is ordered for induction, regardless of whether he is ordered as a special registrant (one having an obligation for service under subsection 4 (i), Universal Military Training and Service Act) or regular registrant (one having an obligation for service under subsection 4 (a) and (b), Universal Military Training and Service Act) and who has applied for appointment as a Reserve commissioned officer of the Army but who has been denied such commission for security reasons, will be processed under the provisions of these regulations.

b. A physician or dentist, special or regular registrant, who is a known Communist will be processed under the provisions of paragraph 17*a* and will not be afforded processing under the provisions of this paragraph.

c. A physician or dentist, special or regular registrant, who refuses to accomplish DD Form 98 in its entirety will not be granted a com-

mission, nor will he be afforded processing under the provisions of this paragraph. Such applicants will be denied a commission by the major commander without any further reference to higher headquarters. They will thereafter be processed under the provisions of paragraph ~~17b~~.

d. A physician or dentist, special or regular registrant, denied an appointment as a Reserve commissioned officer of the Army because of information within the scope of paragraph 13, will, except as indicated in *b* and *c* above, be investigated under section IV subject to prior coordination with the Federal Bureau of Investigation under SR 380–320–1 and SR 380–320–2. Upon completion of the appropriate investigation the case will be processed under section V. The major commander will either close the case favorably and tender the registrant a Reserve commission or he will make one of the recommendations contained in *e* (2) or (3) below, in which case he will be responsible for obtaining postponement from induction until the case has been adjudicated.

e. The Assistant Chief of Staff, ~~G–2~~, Department of the Army, will either direct further investigation or recommend one of the actions ~~in (1) through (3) below~~ and forward the case to The ~~Adjutant~~ General for processing in accordance with section V:

(1) Acceptance of application for commission (favorable closing of case).

(2) Rejection of application for commission but induction in enlisted capacity and indefinite assignment to specially controlled duties.

(3) Rejection for service in any capacity on grounds that such service is inconsistent with the interests of national security (applicable only to registrants coming under the provisions of *d* above).

f. The Department of the Army Screening Board will make one of the following recommendations to the ~~Secretary of the Army~~:

(1) Further investigation.

(2) Acceptance of application for commission (favorable closing of case).

(3) Processing of case under the provisions of these regulations and information to be included in the "Letter of Allegations."

(4) Rejection for service in any capacity on grounds that such service is inconsistent with the interests of national security (applicable only to registrants coming under the provisions of *d* above).

g. ~~The decision of the Secretary of the Army on the recommendation of the Army Screening Board will be implemented by~~ The Adju-

tant General. If the case is to be referred to a field board of inquiry, The Adjutant General will comply with the provisions of paragraph 31*c* except that the "Letter of Allegations" (appropriately modified) will contain information approved by the Secretary of the Army, and will inform the applicant that should he elect appearance before a "Field Board" he may do so with or without counsel, but that such counsel and any other expenses incident to his appearance will be at the applicant's expense.

h. Major commanders will comply with the provisions of paragraph 31*d*. Boards of inquiry will, if possible, be convened in the vicinity of the applicant's residence.

i. Field boards of inquiry and the Department of the Army Review Board will recommend one of the actions indicated in paragraph 37*c*. The recommendation of the Army Review Board will be forwarded to the Secretary of the Army for his decision.

j. Action following final review.

(1) If it is determined that an applicant should be commissioned, The Adjutant General will so direct the major commander concerned.

(2) If it is determined that an applicant should be denied a commission but be inducted and retained in specially controlled duties, The Adjutant General will so direct the major commander who will so inform the applicant. The major commander will notify the appropriate local Selective Service Board that the individual may be inducted but will not mention the assignment to specially controlled duties. The major commander will direct the commanding officer of the induction station through which the individual is processed to initiate flagging action. Flagging action will thereafter be maintained under the provisions of paragraph 12, AR 600–31.

(3) If it is determined that an applicant should be rejected for any type of service, The Adjutant General will so inform the major commander who will in turn inform the appropriate local Selective Service Board by means of a corrected DD Form 62 (Certificate of Acceptability), indicating that the individual concerned is not acceptable for service.

APPENDIX

SAMPLE LETTER INVITING WITNESSES

(See par. 32 *c* (4))

REGISTERED RETURN RECEIPT REQUESTED

A Field Board of Inquiry for the (major commander) has before it the case of (full name). You have given information adverse to (grade and last name) and have not indicated that your identity should be kept CONFIDENTIAL.

(grade and last name) has requested a hearing which be held in the near future. You are invited to attend the hearing to testify before the Board and (grade and last name) and his counsel, if any, and be subject to cross-examination. If you signify a willingness to appear, you will be advised of the time and place of the hearing which will be held in (city and state). (If a hearing date has been set, indicate time and date.)

If you do not care to testify before (grade and last name), you may appear in private before the Board and your name will be held in confidence. If you do not care to testify before the Board, please signify whether your name may be disclosed to (grade and last name) and (if applicable) whether the statement you have submitted to the investigative authorities may be read to (grade and last name) even though your name is not disclosed.

(To other than military personnel on active duty) Your appearance before the Board will be in performance of a public service, since the Department of the Army cannot pay witness fees or reimburse you for travel or other expenses.

For your convenience a self-addressed envelope is inclosed for your reply. No postage is necessary. In reply you may merely check the appropriate statements given on the attached sheet and return it.

Your cooperation in this matter will be greatly appreciated.

Sincerely yours,

President of the Board

Inclosure

INCLOSURE TO SAMPLE LETTER INVITING WITNESSES

Name of case (typed in full)

Check as desired.

1. ------ I will come to the hearing and testify in the presence of (grade and last name) and his counsel, if any, and subject myself to cross-examination.
2. ------ I will testify before the Board in private.
3. ------ I will not testify.
4. ------ I cannot testify on the date set but I will be available on ----------.
5. ------ I am willing for my name to be disclosed to (grade and last name) in connection with the information I have given.
6. ------ I wish my name to remain CONFIDENTIAL.
7. ------ The statement I presented to the investigative authorities may be read to (grade and last name).
8. ------ I desire to make the following comments with regard to the subject case:

DATE---------- SIGNED ----------
ADDRESS ----------

[AG 091.411 (22 Jul 55) G1)]

BY ORDER OF THE SECRETARY OF THE ARMY:

MAXWELL D. TAYLOR,
General, United States Army,
Chief of Staff.

OFFICIAL:

JOHN A. KLEIN,
Major General, United States Army,
The Adjutant General.

DISTRIBUTION:

Active Army, NG, and USAR: A

To be distributed on a need-to-know basis to all units and headquarters down to and including companies and batteries and to units and headquarters of comparable size.

TAGO 531B

U. S. GOVERNMENT PRINTING OFFICE: 1955

PERSONNEL SECURITY CLEARANCE

MILITARY PERSONNEL SECURITY PROGRAM

CHANGES No. 2

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *12 June 1956*

AR 604–10, 29 July 1955, is changed as follows:

All references to the Department of the Army Screening Board and Department of the Army Review Board are changed to read the Department of the Army Security Screening Board and Department of the Army Security Review Board, respectively. All references to the Assistant Chief of Staff, G–1 and Assistant Chief of Staff, G–2 are changed to read the Deputy Chief of Staff for Personnel and the Assistant Chief of Staff, Intelligence, respectively.

2. Definitions. For the purpose of these regulations, the following definitions apply:

* * * * * * *

d. Specially controlled duties. The term "specially * * * has been initiated. Indefinite assignment to specially controlled duties upon direction of the Department of the Army is applicable only to enlisted personnel **on active duty** who have a reserve or service obligation under the Universal Military Training and Service Act. The term "specially * * * designate as sensitive.

* * * * * * *

2.1 (Added) **Responsibilities.** *a. Department of the Army.*

(1) The Deputy Chief of Staff for Personnel exercises overall General Staff monitorship of the Military Personnel Security Program.

(2) The Assistant Chief of Staff, Intelligence is responsible for the establishment of policy pertaining to the conduct of investigations under the Military Personnel Security Program.

(3) The Judge Advocate General is responsible for determining the presence in the investigation file of information of such nature that the reliability thereof may be assessed (see SR 380–320–10) with respect to each allegation as is officially drafted by him. He is responsible for the official drafting of allegations in all cases in which the Assistant Chief of Staff, Intelligence, Department of the Army, recommends processing under the provisions of these regulations.

b. Major commanders. Major commanders are responsible for the implementation of the Military Personnel Security Program at all in-

*These changes supersede C 1, 17 October 1955; DA letter (AGAM–P (M) 380.01 (10 Oct 55) G–1), 17 October 1955, subject: Modification of Procedures Relating to the Military Personnel Security Program; and DA messages 397721, 9 March 1956, and 402295, 26 March 1956.

stallations within their geographical area, including class II and III installations. This includes responsibility for flagging action under AR 600-31.

3. Policy.

* * * * * * *

b. (Superseded) When it is established that retention of a member is *not clearly consistent* with the interests of national security, he will be discharged; except that an inductee currently *on active duty* will not normally be discharged as a security risk unless his retention is *inconsistent* with the interests of national security. (The standard for retention in service of an inductee is of necessity somewhat lower than the standard for other categories of personnel. Thus an inductee may be retained to perform his obligated service in a specially controlled duty under conditions which would require discharge of an officer or an enlistee.)

c. (Superseded) Members who are on active duty and indefinitely assigned to specially controlled duties upon direction of the Department of the Army will *not* be transferred to the Army Reserve. Such individuals will be discharged from the Army Establishment upon completion of their active duty.

* * * * * * *

6. Control of investigative information. Reports and other investigative material and information developed by investigations conducted pursuant to regulations in implementation of the Army security program will remain the property of the investigative agencies conducting the investigation, **except that investigative information on registrants will be furnished to the Department of the Navy or Department of the Air Force upon ultimate induction into either of these services.** Such reports and * * * active Federal service.

9. Effect of favorable determination. *a.* (Superseded) If proceedings hereunder result in a favorable determination that acceptance or retention of the member concerned on a regular duty status is warranted, such a determination will be conclusive and binding, and will in the absence of subsequently developed derogatory information support assignment of the member to any duty for which otherwise qualified to include the granting of a security clearance, if appropriate. In certain cases, the Department of the Army may direct acceptance of a registrant with the proviso that he is not eligible for a security clearance.

* * * * * * *

13. Criteria for application of standard.

* * * * * * *

c. Relief from active duty or discharge under other appropriate directives or regulations. Persons whose conduct * * * by these regulations. However, action will not be initiated to discharge such persons under these regulations unless the criteria set forth in *b* above are also substantially involved, **and** action under other directives or regulations or the Uniform Code of Military Justice has been determined to be inappropriate.

(1) Willful violation or * * * reliable or trustworthy.

d. (Superseded) *Proscribed organizations.* A list of organizations designated by the Attorney General is set forth in AR 604–45.

e. (Added) *Evaluation of derogatory information.*

(1) The criteria set forth above list activities and associations which warrant initiation of action to effect a determination as to whether acceptance or retention within the Army Establishment is warranted. However, the mere existence of information falling within the scope of these criteria does not, in itself, constitute a bar to acceptance or retention. The determination that acceptance or retention is not clearly consistent (or, in the case of inductees, is inconsistent) with the interests of national security must be based upon competent information which indicates, or from which it may be logically inferred, that the individual is motivated or influenced by or is sympathetic to subversive aims or ideologies.

(2) In determining the risks involved in accepting or retaining an individual in, or eliminating him from, the Army, or placing him on specially controlled duties, the following factors will be fully considered:

(*a*) Whether or not the individual made full voluntary disclosure of *substantial* derogatory information concerning himself as requested.

(*b*) The age at which the derogatory action took place.

(*c*) The period of time over which the derogatory action took place.

(*d*) Whether membership in a cited organization was the result of actual belief in, or knowledge of, the subversive nature of the organization or was the result of a desire for social activities, or misguided belief in alleged patriotic motives espoused by the organization. (It should be remembered that Communist front organizations were designed to ensnare persons by appealing to patriotic motives

or other high ideals while the true nature of the organization was disguised.)

(3) The fact that an individual's relatives or associates are or have been engaged in activities or associations listed in the criteria will be used as an allegation only if there is available information which indicates, or from which it may be logically inferred, that the individual is sympathetically influenced in thought or action by the subversive activities or ideologies of his relatives or associates and that his association with them is current.

(4) An individual will not be held accountable for the procommunist or subversive opinions or activities of his character references unless there is available competent information which indicates or from which it can logically be inferred, that he not only had knowledge of but sympathizes with or is influenced in thought or action by those opinions or activities of such character references.

15. Application for appointment or enlistment. Every applicant for * * * a DD Form 390.

* * * * * * *

b. (Superseded) If the applicant completes DD Form 98 (Loyalty Certificate for Personnel of the Armed Forces) with qualifications or entries are made thereon which provide reason for belief that his appointment or enlistment is not clearly consistent with the interests of national security, such appointment or enlistment will be held in abeyance. Physicians and dentists subject to induction who are applicants for appointment will be processed in accordance with paragraph 37. Applicants whose qualification for appointment is achieved by attending an Army approved school leading to such appointment will be processed in accordance with paragraph 38. In the case of other applicants the application, together with the DD Form 98 and DD Form 398 (Statement of Personal History) or DD Form 390 (Data for Determining Certain Qualifications of Special Registrants) will be forwarded, with recommendations, through intelligence channels to the Assistant Chief of Staff, Intelligence, Department of the Army, Washington 25, D. C., ATTN: Chief Security Division. Except as indicated in paragraphs 37 and 38, applicants will not be appointed or enlisted without specific approval of the Secretary of the Army.

* * * * * * *

17. (Superseded) **Registrants for induction.** *a.* A registrant who refuses to accomplish DD Form 98 in its entirety or who discloses significant derogatory information with respect to his background

or on whom the Department of the Army or any of its commands has derogatory information will not be inducted pending the following actions. In the case of refusal to complete or qualification of DD Form 98, the commanding officer of the induction station will forward a letter report, subject, "Qualification of DD Form 98," to the major command, ATTN: G2. The letter will include the name, the date and place of birth, the civilian address of the person, the Selective Service number, and his grade and service number, if known. The Form 398 and fingerprint card FD Form 258, properly completed, will be forwarded as inclosures to the letter report. The major commander will in all cases obtain the registrant's postponement from induction until final resolution of the registrant's status has been made. If the individual qualified or refused to complete Form 98, he will be interviewed as provided in paragraph 18. Where the individual qualified Form 98, the major commander may close the case favorably following such interview and declare the registrant acceptable for induction. In such a case the following entry will be made in the remarks section of DD Form 98: "The information contained hereon has been determined to be no bar to induction." This entry will be authenticated by the security officer of the major command headquarters making the determination. When induction of a registrant is initially held in abeyance, and when such cases are closed favorably, the major commander concerned will forward to Department of the Army priority message reports in accordance with AR 600–31. In all other cases, the major commander will initiate a complaint type investigation, subject to prior coordination with the Federal Bureau of Investigation as provided in AR 381–115, and comply with the provisions of AR 600–31. Upon completion of the investigation, if the major commander closes the case favorably he will declare the registrant acceptable for induction and take further action as indicated in paragraph 27*c*. If the case is not closed favorably the major commander will forward the case in accordance with paragraph 27*a*. Favorably completed cases on registrants ultimately inducted into the Navy or Air Force will be transmitted to the appropriate major commander of the component service concerned.

b. Standing alone, the refusal to complete Form 98 in its entirety will not be used to deny induction. However, such a case cannot be closed favorably by the major commander. If the Department of the Army declares the registrant acceptable for induction the following entry will be recorded on appropriate personnel records: "Not eligible for security clearance."

c. Except as provided in paragraph 37, registrants rejected for induction by the Department of the Army will not be afforded an opportunity to appear before a board of inquiry.

18. (Superseded) **Interview.** Before the qualification of, or refusal to accomplish, Form 98 is used as a basis for the initiation of a complaint type investigation, a Counterintelligence Corps agent will interview the individual to—

a. Give a thorough explanation of the concern of the Department of the Army caused by the individual's qualification or nonexecution of the Form 98.

b. Advise the individual of the effect of applicable regulations upon his status in the Army.

c. Afford the individual an opportunity to volunteer as complete a statement as he desires to clarify his position and to furnish any information which may be useful in making a determination in his case. It is preferable that any statement given be a sworn statement and that any information furnished be under oath, but such action is at the option of the interviewee. Approval by the Assistant Chief of Staff, Intelligence, to conduct this interview under oath is not required. In those cases where the individual has not claimed Federal Constitutional Privilege or refused to sign the DD Form 98 but has cooperated in furnishing information which in itself is not sufficient to warrant an unfavorable recommendation under these regulations, any investigation predicated thereon will be classified as a personnel security investigation. In such cases, the provisions of paragraph 27*c* (1) and (2) will apply until such time as the investigation may develop sufficient credible derogatory information which warrants its classification as a complaint type investigation. Upon completion of the investigation, the case will be forwarded as required by paragraph 27*c*(3).

19. Type of discharge. *a.* (Superseded) When the approved findings of the Army Security Review Board indicate that a member of the Army Establishment should not be retained under the standards and criteria prescribed in these regulations, he will be discharged and the character of discharge will be as directed by the Department of the Army Security Review Board in accordance with the following policies:

(1) Members who complete their term of active duty will be issued a discharge based on the character of service performed. However, an individual who completes his active duty solely because he has been able to delay final action in the security proceedings by court action, or through other

voluntary acts, will have the character of his discharge determined in accordance with (2) below.

(2) Members on active duty who are discharged prior to the completion of their active duty term of service will be issued a discharge based on the gravity of the substantiated derogatory information (regarding matters occurring prior to and during their period of service) which requires their discharge and upon the character of service performed.

(3) Members of the United States Army Reserve and National Guard of the United States not on active duty who are discharged prior to the completion of their term of service will be issued a discharge based on the gravity of the substantiated derogatory information (regarding matters occurring prior to and during their period of service) which requires their discharge and upon the character of service performed.

(4) Character of service will be interpreted to include those factors normally taken into account in determining the character of separation where no adverse security finding has been made, as well as any reasonably substantiated derogatory information concerning subversive activities occurring during the period of service, and falsification, in connection with security matters, occurring during the period of service or pertaining to entry into the service. The character of separation will not take into account any limitations on performance of duty imposed for security reasons.

(5) Regular Army officers with over 3 years' service as such will be furnished a discharge authorized by section 106, Army and Air Force Vitalization and Retirement Act of 1948 (61 Stat. 1082; 10 U. S. C. 585).

a.1 (Added) Members relieved from active duty prior to completion of action under these regulations will be separated with character of separation determined in accordance with *a* (1) and (4) above. As an interim measure, such members may be issued a character of separation "To be Determined."

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27. Action by major commander upon completion of investigation. A positive recommendation in the light of the criteria of paragraph 13 is required in each case indicating whether or not, based upon all the information available, **acceptance or** retention of the member concerned is or is not warranted under the standards and criteria prescribed by these regulations. The following rules will apply:

a. When the information available, e. g., receipt of Federal Bureau of Investigation reports, reports of investigation from Department of the Army or other departments, or credible derogatory information from any source is of sufficient stature to support a positive recommendation that **acceptance or** retention is not warranted, the major command will forward the case, with DD Form 98 (and DD Form 398, if appropriate), to the Department of the Army, ATTN: Assistant Chief of Staff, **Intelligence** (Chief, Security Division), without prior referral to the subordinate command. The major commander * * * following as appropriate:

* * * * * * *

(2) Retention on indefinite assignment to specially controlled duties with or without change of station (applicable only to enlisted personnel **on active duty who have** a reserve or service obligation under the Universal Military Training and Service Act).

(3) (Added) Rejection for induction.

* * * * * * *

e. It is recognized * * * for the action. **The losing commander prior to issuance of travel orders will notify the appropriate oversea returnee reassignment station by electrically transmitted message with an information copy to The Adjutant General, Department of the Army, Washington 25, D. C., ATTN: AGPO–SI, of the pending assignment citing the paragraph, special order number, issuing headquarters and date, estimated time of arrival, expiration of term of service, home of record of member, and authority for reassignment. He will also indicate what assignment is considered suitable for such personnel and whether, in his opinion, such personnel should be separated from the Army. The losing commander will insure that flagging action is taken under AR 600–31. The command of ultimate assignment will be responsible for the continuation of flagging action. The losing commander will forward by the most expeditious means possible two copies of the report of investigation and orders to the Assistant Chief of Staff, Intelligence, Department of the Army, Washington 25, D. C., ATTN: Chief, Security Division. Upon receipt of the investigation the Assistant Chief of Staff, Intelligence, Department of the Army will be responsible for taking further action.**

28. **Action by the Assistant Chief of Staff, *Intelligence*, Department of the Army.** Whenever information is received from the Federal Bureau of Investigation or any other source which indicates that

acceptance or retention may not be warranted under the standards and criteria prescribed by these regulations, action will be as follows:

a. When the information is of sufficient stature to support removal—

(1) The case will be forwarded to **The Judge Advocate General,** Department of the Army, with appropriate recommendation and information on which to base a "Letter of Allegations."

* * * * * * *

b. When the information is not of sufficient stature to warrant removal—

* * * * * * *

(2) Forward the case to **The Judge Advocate General,** Department of the Army, with information on which to base a "Letter of Allegations" and with a recommendation that the member should be retained within the service and assigned to specially controlled duties, or

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b.1 (Added) When the information is of sufficient stature to support rejection for induction—

(1) The case will be forwarded to The Adjutant General with appropriate recommendation and information.

(2) Action under AR 600–31 will be directed if not previously accomplished.

b.2 (Added) When the information is not of sufficient stature to warrant rejection for induction—

(1) Close the case favorably and request The Adjutant General to inform the major commander that the individual is acceptable for induction.

(2) In cases where credible information supports nothing more derogatory than a refusal to complete DD Forms 98, 398, or 390 in their entirety, forward the case to the Deputy Chief of Staff for Personnel, Department of the Army, for final action.

c. (Superseded) When the information is not of sufficient stature to support a positive recommendation—

(1) Direct interview under oath.

(2) Issue an interrogatory.

(3) Direct further investigation.

* * * * * * *

29. General. *a.* (Superseded) Upon receipt of a case with appropriate recommendation from the Assistant Chief of Staff, Intelligence, Department of the Army, The Judge Advocate General will

review the file, determine the presence of information of such nature that the reliability thereof may be assessed and will, if appropriate, draft the allegations to be used in a "Letter of Allegations." The Judge Advocate General is authorized to require the Assistant Chief of Staff, Intelligence, Department of the Army, or other sources within the Department of the Army to obtain, or attempt to obtain, such additional investigative information as may be required to substantiate fully the allegations. Upon completion of this action the case, with the official draft of the "Letter of Allegations," if appropriate, and the recommendations of the Assistant Chief of Staff, Intelligence, will be forwarded to The Adjutant General, Department of the Army. Cases wherein the sole allegation against a member on active duty is that he refused to complete DD Forms 98, 390, or 398 in their entirety will be forwarded direct to the Deputy Chief of Staff for Personnel, Department of the Army, for final action.

a.1 (Added) Upon receipt of a case with appropriate recommendation, The Adjutant General will—

(1) If a Regular Army commissioned officer with over 3 years' service as such, process the case under section IV, AR 605–200. The case will, however, be referred to the Department of the Army Security Screening Board for action in accordance with paragraph 30.

(2) Refer all other cases to a Department of the Army Security Screening Board for review and recommendations.

b. (Superseded) Major commanders will designate security advisors to provide guidance to field boards on such security matters as release of information, capabilities and limitations of investigative agencies and techniques, significance of alleged subversive activities, and the course of questioning to be followed during the hearing. Major commanders, if they consider it necessary or if requested to do so by the president of a field board, will provide the field board additional assistance by furnishing a legal advisor.

* * * * * * *

30. Department of the Army Security Screening Board. A **Security** Screening Board composed of a minimum of three field grade officers operates at Department of the Army level. This board will review all cases received **by The Adjutant General from The Judge Advocate General and will recommend to the Deputy Chief of Staff for Personnel, Department of the Army, one of the following actions:**

* * * * * * *

b. (Superseded) **Further investigation.** (Requests will be made direct to the Assistant Chief of Staff, Intelligence, Department of the Army.)

* * * * * * *

f. (Superseded) Retention on active duty of those enlisted personnel *on actice duty* who have a reserve or service obligation, against whom insufficient information exists to warrant their removal in the interests of national security but against whom sufficient evidence exists to warrant their indefinite assignment to specially controlled duties.

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h. (Added) Rejection for induction.

i. (Added) Acceptance with the proviso that the individual is not eligible for a security clearance. (Applicable only to cases which involve a refusal to complete DD Forms 98, 398, or 390 in their entirety.)

31. Follow-up of Security Screening Board recommendations.

a. (Superseded) *Action by Deputy Chief of Staff for Personnel.* The Deputy Chief of Staff for Personnel, Department of the Army, will take action, for the Secretary of the Army, and either approve the recommendations of the Security Screening Board or direct one of the actions indicated in paragraph 30. In addition to the actions contained in paragraph 30 the Deputy Chief of Staff for Personnel may, on cases received from any source, direct any other actions deemed appropriate within the scope of pertinent regulations. The Adjutant General will implement the action desired by notifying the appropriate staff agency and/or field command.

b. Action to continue the case. **Rescinded.**

c. Letter of Allegations. Upon receipt of a **request from the Deputy Chief of Staff for Personnel, Department of the Army, to initiate elimination action or to indefinitely assign the member to specially controlled duties, The Adjutant General will, using the allegations drafted by The Judge Advocate General, prepare a "Letter of Allegations."** The "Letter of Allegations" will cite * * * the respondent that—

* * * * * * *

32. Field board of inquiry.

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c. Field boards of * * * special provisions apply:

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(7) The Board will recommend one of the following:

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(*b*) Retention on indefinite assignment to specially controlled duties with or without change of station (applicable only to enlisted personnel **on active duty who have** a reserve or service obligation under the Universal Military Training and Service Act).

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(10) (Added) The board will record the proceedings of each meeting, once it has initially convened. In any case in which a board is unable to complete proceedings (arrival at findings and recommendations) because of death or discharge of respondent, or other reasons, the incomplete proceedings, signed by the board members and showing cause for incompletion, will be forwarded through channels to The Adjutant General.

37. Physicians and dentists denied commissions and subject to induction.

* * * * * * *

c. A physician or * * * to higher headquarters. They will thereafter be processed under the provisions of paragraph 17***a.***

d. A physician or dentist, special or regular registrant, denied an appointment as a Reserve commissioned officer of the Army because of information within the scope of paragraph 13***b*** **or *a* combination of paragraphs 13*b* or *c*** will, except as indicated in *b* and *c* above, be investigated under section IV subject to prior coordination with the Federal Bureau of Investigation under AR 381-115. Upon completion of * * * has been adjudicated.

e. The Assistant Chief of Staff, **Intelligence,** Department of the Army, will either **close the case favorably,** direct further investigation or recommend one of the **following actions and forward the case to The Judge Advocate General** for processing in accordance with section V:

(1) **Rescinded.**

* * * * * * *

f. (Superseded) The Department of the Army Security Screening Board will make one of the following recommendations to the Deputy Chief of Staff for Personnel:

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g. (Superseded) The decision of the Deputy Chief of Staff for Personnel, Department of the Army, on the recommendations of the Security Screening Board will be implemented by The Adjutant General. If the case is to be referred to a field board of inquiry, The Adjutant General will comply with the provisions of paragraph

31*c* and will inform the applicant that should he elect appearance before a "Field Board" he may do so with or without counsel but that such counsel and any other expenses incident to his appearance will be at the applicant's expense.

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38. (Added) Students denied appointment. *a.* Officers Candidate School, Reserve Officers Training Corps, aviation and other students pursuing courses of instructions at Army approved schools which lead to appointment, and who apply for and are denied such appointment under provisions of paragraph 15*b* or because of information within the scope of paragraph 13*b* will be processed under the provisions of this paragraph. Such applicants will be investigated under section IV, subject to prior coordination with the Federal Bureau of Investigation under the provisions of AR 381-115. Upon completion of the appropriate investigation the case will be processed under section V. The major commander will, if he closes the case favorably, tender the applicant an appointment, permit him to complete the schooling required for appointment or return him to the school to permit him to complete the schooling required for appointment. If he does not close the case favorably the major commander will recommend one of the following:

(1) Rejection of applicant for appointment and, if inducted, acceptance for induction in regular duty status.

(2) Rejection of applicant for appointment and, if on active duty, retention on indefinite assignment to specially controlled duties. (Applicable only to enlisted personnel *on active duty* who have a reserve or service obligation under the Universal Military Training and Service Act.)

(3) Rejection for service in any capacity on grounds that such service is inconsistent with the interests of national security.

(4) Discharge in the interests of national security and the type of discharge.

In the event he recommends one of the actions set forth in (1) or (3) above, the major commander will be responsible for obtaining postponement from induction, until the case has been adjudicated.

b. The Assistant Chief of Staff, Intelligence, Department of the Army will either close the case favorably, direct further investigation or recommend one of the actions contained in *a* (1) through (4) above and forward the case to The Judge Advocate General for processing in accordance with section V. The Department of the Army Security Screening Board will recommend to the Deputy Chief of Staff for Personnel whichever of the actions contained in paragraphs 30 and/or

a above is appropriate. The Adjutant General will take the action described in paragraph 37*g* and major commanders will comply with paragraph 31*d*. Boards of inquiry will, if possible, be convened in the vicinity of the applicant's residence or military location, as appropriate. Field Boards of Inquiry and the Army Security Review Board will recommend either acceptance of applicant for appointment (favorable closing of case) or one of the actions contained in *a* above. The recommendation of the Security Review Board will be forwarded to the Secretary of the Army for his decision. Action following final review will be in accordance with paragraphs 35 or 37*j*, as appropriate.

[AG 001.411 (24 May 56) DCSPER]

By Order of *Wilber M. Brucker*, Secretary of the Army:

MAXWELL D. TAYLOR,
General, United States Army,
Chief of Staff.

Official:

JOHN A. KLEIN,
Major General, United States Army,
The Adjutant General.

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